Supreme Court, U. S.
FILED
MAR 29 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

No. 492.

FEDERAL TRADE COMMISSION,
Petitioner,

against

ANDERSON GRATZ and BENJAMIN GRATZ, co-partners, doing business under the firm name and style of WARREN, JONES & GRATZ; P. P. WILLIAMS, W. H. FITZHUGH and ALEXANDER FITZHUGH, co-partners, doing business under the firm name and style of P. P. WILLIAMS & COMPANY and CHARLES O. ELMER,
Respondents.

RESPONDENTS BRIEF.

THOMAS F. MAGNER,
Attorney for Respondents,
32 Court Street,
Brooklyn, N. Y.

INDEX.

PAGE

POINT I—Order Violates Constitutional Rights of Respondents 12

POINT II—Sect. 5 Federal Trade Law has not Changed the Substantive Law 13

POINT III—Sect. 5, Fed. Trade Law is Unconstitutional as Conferring on Commission Judicial Powers 13

POINT IV—Sect. 5, Fed. Trade Law is Unconstitutional or Delegating to the Trade Commission Legislative Powers 13

POINT V—There is No Evidence to Support the Material Findings 13

POINT VI—There is No Finding of Fact by the Commission to Support the Conclusion of Law 14

POINT VII—Errors were Committed in Taking the Testimony 14

POINT VIII—The methods of the Commission in this Investigation are Unfair and Prejudicial to Respondent 14

AUTHORITIES CITED.

PAGE.

United States vs. Colgate Co., 250 U. S., 300, 307 15
Goppin vs. Dist. of Columbia, 22 App. D. C., 68 16
People vs. Budd, 117 N. Y., 1-15 17
Holden vs. Hardy, 169 U. S., 366 17
People vs. Gilson, 109 N. Y., 398 18
Live Stock Association vs. Crescent City etc., Co. (1 Abb. U. S., 388, 398) 18
Slaughter House Case (16 Wall, 36, 106) 18
Matter of Jacobs (98 N. Y., 98) 18
Berthoff vs. O'Reilly (74 N. Y., 509) 18
People vs. Marx, 199 N. Y., 377 18
Butcher's Union Company vs. Crescent City Co. (111 U. S., 746) 20
Wright vs. Hart (182 N. Y., 330) 22
State vs. Loomis (115 Mo., 307) 23
Allgeyer vs. Louisiana (165 U. S., 578)..... 23
Wynehamer vs. People, 13 N. Y., 378, 398 23
People ex rel. Manh, S. Inst. vs. Otis, 90 N. Y., 48 23
Standard Oil Co. vs. U. S., 221 U. S., 1-62 ... 23
State vs. Fire Creek Coal Co., 30 W. Va., 188 .. 24
Yick Wo vs. Hopkins, 118 U. S., 356 24
Minnesota vs. Barber, 136 U. S., 313 24
Powell vs. Pennsylvania, 127 U. S., 678, 684 .. 24
Lochner vs. New York, 198 U. S., 45, 53 24
Forster vs. Scott, 136 N. Y., 577-584 24
Stuart vs. Palmer, 74 N. Y., 183 25
Gilman vs. Tucker, 128 N. Y., 190, 200 25
Colon vs. Lisk, 153 N. Y., 188, 194 25
Hauser vs. North British Ins. Co., 206 N. Y., 453, 462 28
Gulf, Colorado & St. P. R. R. vs. Ellis, 165 U. S., 150, 165 28
Cotting vs. Kansas City Stock Yds., 183 U. S., 79 28

PAGE

Kentucky R. R. Tax Cases, 115 U. S., 321, 337 28
Connolly vs. Union Pipe Co., 184 U. S., 540 .. 28
Janesville vs. Carpenter, 77 Wis., 288, 301 ... 28
Powell vs. Pennsylvania, 127 U. S., 678 28
Missouri vs. Lewis, 101 U. S., 22, 31 28
United States vs. American Tobacco Co., 221 U. S., 106-179 29
United States vs. Keystone Watch Case Co., 218 Fed., 502-515-516 31
United States vs. N. P. R. R., 92, U. S., 72, 79 34
Marx vs. Hawthorn, 30 Fed., R., 379, 585, 587 38
Banon vs. Bearns, 39 Fed. R., 892-895-896 ... 38
Cooley's Const. Lim., 6th Ed., 452-453 38
Grosbeck vs. Seeley, 13 Mich., 329 38
White vs. Flynn, 30 Ind., 46 38
Corbin vs. Hill, 21 Ind., 70 38
Wantlan vs. White, 19 Ind., 470 38
People vs. Lyon, 27 Hun, 180-182 (N. Y.) .. 38
Kelly vs. Herall, 10 Sawyer (U. S.) 161, 169 .. 38
King vs. Dedham Bank, 15 Mass., 447 38
Chicago R. R. vs. Minnesota, 134 U. S., 413 ... 38
United States vs. Klein, 13 Wallace U. S., 128, 146, 147 38
L. R. & F. R. R. vs. Payne, 33 Ark., 816 38
Meyer vs. Berlandi, 39 Min., 438 38
Felix vs. Wallace, 62 Kans., 667 38
Missouri R. R. vs. Sinnonsen, 64 Kans., 802 .. 39
Kansas City S. R. vs. Albers Co., 233 U. S., 573, 591 39
Mackay vs. Dillon, 4 How., 421, 447 39
Dower vs. Richards, 151 U. S., 658, 667 39
Stanley vs. Schwalbey, 162 U. S., 255, 74, 77, 79 39
Schlemmer vs. Buffalo, 205 U. S., 1 39
Cedar Rapids Gas vs. Cedar Rapids, 233 U. S., 655, 669 39
Graham vs. Gill, 223 U. S., 643 39

PAGE

Oregon R. R. Co. vs. Fairchild, 224 U. S., 510, 528 39
People ex rel Comaford vs. Dutcher, 83 N. Y., 240, 242 41
Hill vs. People, 20 N. Y., 363 41
Wood vs. City of Brooklyn, 14 Barb., 425, 432 42
Warren vs. People, 3 Parker, 544 42
Colon vs. Lisk, 153 N. Y., 188, 193, 194 42
Parsons vs. Bedford, 3 Peters (U. S.) 433, 446 42
The Sarah, 8 Wheaton (U. S.) 391 42
Graves vs. N. P. R. R., 5 Mont., 556 42
Interstate Com. Com. vs. L. & N. R. R., 227 U. S., 88-91 44
Interstate Com. Com. vs. N. P. R. R., 216 U. S., 538-544 44
Mnfctrs. R. R. Co. vs. United States, 246 U. S., 457-482 44
Mitchel Coal & Coke Co. vs. Penn. R. R., 230 U. S., 247-258 45
Penn. R. R. vs. Interstate Coal Co., 230 U. S., 184-1196 45
Cincinnati, Williamstown R. R. vs. R. R. Commission, 1 Ohio St., 77..... 47
Union Bridge Co. vs. United States, 204 U. S., 364, 385 47
Fields vs. Clark, 143 U. S., 649, 692 47
Chinese Exclusion Case, 130 U. S., 581, 609 .. 47
United States vs. Standard Oil Co., 173 Fed., 177, 195 51
Patterson vs. United States, 222 Fed., 599, 619 51
United States vs. Keystone Watch Case Co., 218 Fed., 502-518 52
United States vs. International Harvester Co., 214 Fed., 987-1005 52
United States vs. American Naval Stores, 172 Fed., 455-458 52
United States vs. U. S. Steel Corp. (March 1, 1920) 52

Supreme Court of the United States

FEDERAL TRADE COMMISSION, Petitioner, against ANDERSON GRATZ and BENJAMIN GRATZ, co-partners, doing business under the firm name and style of WARREN, JONES & GRATZ; P. P. WILLIAMS, W. H. FITZHUGH and ALEXANDER FITZHUGH, co-partners, doing business under the firm name and style of P. P. WILLIAMS & COMPANY and CHARLES O. ELMER, Respondents.	No. 492.

BRIEF OF RESPONDENTS, WARREN, JONES & GRATZ AND P. P. WILLIAMS & CO.

By a writ of certiorari, issued out of this court on the petition of the Federal Trade Commission, the Commission seek to review an order of the

Circuit Court of Appeals, Second Circuit, which reversed and set aside an order of the Federal Trade Commission which forbade the respondents above named from selling cotton bagging and cotton ties together in proportionate quantities.

The respondents, Anderson Gratz and Benjamin Gratz, the surviving members of the firm of Warren, Jones & Gratz, are merchants, who for over forty years have been engaged in the selling of cotton bagging and cotton ties; the respondents, P. P. Williams & Company, are merchants engaged at Vicksburg, Mississippi, in merchandising, buying and selling over seventy different articles, including cotton bagging and cotton ties; the respondent, C. O. Elmer, is a broker, engaged in business at New Orleans.

Cotton bagging is the loose woven cloth used to cover cotton bales. The cloth is held about the cotton bales by ties made of hoop steel. Six yards of bagging and six ties are usually required to cover each bale. This is called a pattern. From time immemorial it has been the custom to sell ties and bagging together by the pattern, as one witness expressed it, "just like cups and saucers." Cotton bagging is made in the United States by American Manufacturing Company, whose principal place of business is at Brooklyn, New York; who manufacture about forty-five (45%) per cent. thereof; by the Ludlow Associates, of Boston, Mass., who manufacture about twenty (20%) per cent. thereof; the remaining thirty-five (35%) per cent. is made up by the use of second-hand bagging and a material called sugar bag cloth. The sugar bag cloth was originally used for covering the sugar crop brought to the United States from Cuba and

is put up by Young & Metzner and the Federal Sugar Company, both of New York. The remade or rewoven or second-hand bagging is put up by a number of smaller concerns, the principal of which is the Carolina Bagging Company, located at Henderson, N. C.

Cotton ties previous to 1915 were manufactured by the Carnegie Steel Company, the Pittsburg Steel Company and the Sharon Steel Company, located at Pittsburg, Pa., the Atlantic Steel Company, at Atlanta, Ga., and Connors-Weyman Company at Birmingham, Ala. In 1915 the Sharon Company ceased to manufacture cotton ties (fols. 774, 775). The other companies still continue to do so.

The respondents, Gratz, were the agents for American Manufacturing Company for selling their bagging west of the State of Alabama. They were also officers of American Manufacturing Company. They were agents for the Carnegie Steel Company for the selling of steel ties.

It had been the custom in the trade for many years for the firm of Warren, Jones & Gratz, representing the Carnegie Steel Company, before the opening of the market, which usually occurred in the latter part of June in each year, to allot to the Ludlow Associates, American Manufacturing Company, the Federal Sugar Company, and Young & Metzner, a sufficient amount of ties to go with the cotton bagging and sugar cloth which they were manufacturing for the current year. These concerns would then dispose of the bagging manufactured by them and the ties so allotted together, in quantities being the multiples of six yards of bagging and six ties. In the State of Texas, which is the largest cotton growing territory in the United

States, the railroads shipped car-lots of bagging and ties together in these assorted patterns at reduced rates. The freight would be less for covering 1,000 bales than for the covering for 500 bales (page 350). After the Ludlow Associates, the American Manufacturing Company, Young & Metzner and the Federal Sugar Company were provided for, the smaller concerns were taken care of. The rewoven or second-hand or remade bagging with pieced ties were used together and exclusively in the southeasterly portion of the cotton belt. None of the respondents dealt in these articles (pages 345, 346).

That this practice must have been satisfactory to the trade is shown from the fact that nowhere in this record is it disclosed that *any manufacturer of cotton bagging or any manufacturer of steel ties, who alone were competitors of the respondents, made any complaint about the conduct of the respondents in the manner in which they handled these articles for the trade.* Indeed, no serious complaint as to the conduct of the respondents was made to the Federal Trade Commission by any responsible person, and no complaint which would warrant the Trade Commission in making this investigation and subjecting these respondents to the annoyance and expense which it has entailed upon them.

Previous to 1916 it is conceded that no one had any cause for complaint because of the conduct in trade of these respondents. In 1916, by reason of the great war, cotton was in great demand for explosives as well as for clothing, and steel was likewise demanded for armament and shells. The steel manufacturers could get better prices for hoops

than they could for the ties from which the hoops were fabricated. In 1915 steel hoops were worth $5.65 a ton more than the ties, in 1916 $5.70, and in 1917 $9.77 more, and it cost $2.00 a ton to fabricate the ties from the hoops (fols. 783, 790). The importation of jute out of which the bagging was made almost ceased. There was then an apprehension that there would be a scarcity of both ties and bagging, in which event the cotton crop could not be marketed, which meant national misfortune. All of the steel manufacturers made less ties in 1916 than they did in 1915, and one, the Sharon Steel Company, ceased to make them altogether (fols. 774, 775). In 1917 the Carnegie Steel Company was the only steel company that made a greater percentage of ties than they had made in previous years, and they did this at the earnest solicitation of the respondent, Anderson Gratz (fols. 778, 779). Burlap made from the advanced 304% (while cotton bagging made from jute advanced but 45% (fols. 834, 835). Not only was material scarce and dearer but railroad facilities for transportation were poorer, and the anxiety to get ties and bagging and the apprehension lest they might not be had, was increased by speculators who sent scarehead circulars among the trade. One of the most industrious of these was M. M. Graves, a witness before the Commission, who had carried over from 1915, 158,000 bundles of new ties upon which he cleaned up a profit of about $100,000 before the market was opened by the respondents for the sale of ties in 1916 (pages 140, 141). To overcome the drawbacks that these conditions produced in the trade the respondent, Anderson Gratz, actuated by the highest and most patriotic motives

and disdaining to clean up a fortune which he might have done in the early part of 1916, before the market for the sale of cotton ties opened, let it be known that only those who bought bagging would be supplied with the ties that they had for sale, and at the same time urged upon all the steel makers the necessity for their making more ties in 1916 than they had in previous years (fols. 788, 795, 797). He even went so far as to ask Mr. Glenn, of the Atlantic Steel Company, and Mr. Connors, of the Connors-Weyman Steel Company, to supply some of Warren, Jones and Gratz's customers, who had theretofore been supplied by Carnegie Steel Company, with ties manufactured by the Atlantic Steel Company and the Connors-Weyman Steel Company (fols. 785, 786, 795, 797). Instead of monopolizing the market Warren, Jones & Gratz were steadying the market at the expense of their own trade, and to their pecuniary loss.

When the speculators in ties found out that they could not obtain ties without at the same time purchasing bagging their demand for ties ceased *and shortly after the market opened in June,* 1916, *the respondents sold any quantity of ties without bagging to all who desired to buy,* and sent telegrams and letters broadcast throughout the cotton territory notifying all dealers to that effect (fols. 849, 850, 851). They actually sold for the Carnegie Company more ties than Carnegie Company did or could make. Within the week after the market opened on June 26th, they were oversold. Up to July 31, they had sold 1,363,478 bundles (fol. 838), although the Carnegie Company in that year only manufactured 991,556 bundles. They made themselves liable as merchants for the loss of a

large sum of money if the persons to whom they had sold these ties insisted on the performance of their contracts (fol. 838). *But they stopped the panic for ties.* In accomplishing this result naturally they gave displeasure to some people but they were not that class for whom honest men would ordinarily express any sympathy.

Among these people was one, Saul H. Lowenberg of Natchez, Miss., who some years previously had defrauded Warren, Jones & Gratz out of payment for a quantity of bagging (fols. 844, 168, 169). In 1916 he had been refused ties by The Atlantic Steel Co., the Pittsburg Co., and Connors-Weyman Co. (fol. 156). The respondents, Williams & Co. and Elmer, were the only ones who would sell him ties (fols. 156, 158, 166). For obvious reasons he did not apply to the respondents Warren, Jones & Gratz. He had purchased a small quantity of bagging from the Ludlow Associates who had been furnished ties to go with their bagging by Carnegie Company, but who would not furnish him ties to go with it. He says that when making complaint to Mr. Wallace of the Ludlow Company, that he could not procure ties to go with their bagging, Mr. Wallace suggested that he make a complaint to the Federal Trade Commission about conditions in the tie trade. Mr. Wallace was not examined as a witness. His company was furnished by respondents with ties sufficient for all the bagging they manufactured. In January, 1917, Lowenberg did make his complaint, not against the steel companies that had denied him ties, but against the agents of the Carnegie Co. who had befriended him on an *"impression"* that

Warren, Jones & Gratz were responsible for the conditions existing (fol. 179). No doubt he was actuated by that malice which one who injures another always harbors for his victim. The Federal Trade Commission thereupon started an investigation by a circular letter as well as by personal agents throughout the cotton states, and on the 17th day of June, 1917, caused to be served upon the respondents a complaint in which the respondents were charged with violating Sec. 5 of the Act of Congress approved September 26, 1914, known as the Federal Trade Commission Act, and also with violating Section 4, of the Act of Congress approved October 15th, 1914, known as the Clayton Act.

The first count of the complaint charges by paragraph 3

> *"that with the purpose, intent and effect of "stifling competition in interstate commerce* "in the sale of such bagging, all the respond- "ents do now refuse, and for more than a year "last past have refused to sell any of such "ties unless the prospective purchaser thereof "would also buy from them bagging to be used "with the number of ties proposed to be "bought; that is to say, for each six of such "ties proposed to be bought from the respond- "ents the prospective purchaser is required to "buy six yards of such bagging."

The second count in the complaint charges respondents with violating the provisions of the Clayton Act as follows:

"That all of the said respondents for more "than a year last past in the course of inter- "state commerce in violation of Sec. 3 of the "Act of Congress, have sold and made con- "tracts for sale, and are now selling and mak- "ing contracts for sale, of large quantities of "such ties and such jute bagging for use, con- "sumption, and resale within the United "States, and *have fixed, and are now fixing the "price charged therefor or the discount from "or rebate upon such prices on the condition, "agreement, or understanding, that the pur- "chasers thereof shall not use or deal in the "goods, wares, merchandise or other commod- "ities of a competitor or competitors of re- "spondents,* and that the *effect of such sales* "and contracts for sales, or such conditions, "agreements, or understandings may be and *is "to substantially lessen competition or tend "to create a monopoly* in such cotton jute bag- "ging industry."

This last charge was absolutely baseless and was known to be so by the Commission from the beginning.

The Federal Trade Commission named an examiner and a lawyer associate and sent them abroad in the land investigating the charges set up in the complaint. They took testimony at Jackson, Miss., Vicksburg, Miss., New Orleans, La., Pittsburg, Pa., Norfolk, Va., New York City, N. Y., and St. Louis Mo. They examined twenty-one witnesses and subpoenaed many more, some of whom they did not examine as their testimony would help these respondents (fol. 193). THEY

DID NOT PRODUCE A SINGLE WITNESS NOR A SCINTILLA OF EVIDENCE TO SUBSTANTIATE THE CHARGE MADE IN THE SECOND COUNT OF THE COMPLAINT, TO WIT: THAT THE RESPONDENTS HAD VIOLATED ANY OF THE PROVISIONS OF THE CLAYTON ACT, or had made contracts with relating clauses. They did not produce a single witness whose testimony tended in the slightest degree to prove the allegation in the first count of the complaint that *"with the intent and effect of discouraging and stifling competition,"* the *respondents had refused to sell any person ties unless they would at the same time buy from them cotton bagging.* And they did not produce a single witness who had not obtained from respondents during the times alleged in the complaint sufficient ties to go with all the bagging that they had purchased, whether they had purchased their bagging from the respondents or their competitors and they suppressed proof that had been furnished them establishing worthy motives to the respondents. Notwithstanding this proof the examiner appointed to take the testimony made findings, which the Commission approved in the same identical words, and made an order thereupon directing the respondents to desist from doing what had been the custom in the trade from the time when the memory of the man runneth not to the contrary, and what all other merchants and manufacturers in the country engaged in the same line of business are to-day doing namely of selling cotton ties and cotton bagging together in proportionate quantities.

The respondents duly petitioned the United States Circuit Court of Appeals in the Second Circuit for the reversal of this order and that Hon-

orable Court after due deliberation had thereon duly made and entered its order reversing and setting aside the order of the Federal Trade Commission and in their opinion state as follows:

> "And we discover no evidence to support the finding in Paragraph 2 that the respondents adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished also to buy from them unless such merchants and dealers would also buy from them a quantity of jute bagging. It is the natural and prevailing custom in the trade to sell ties and bagging together just as one witness testified it is to sell cups and saucers together. *Such evidence as there is of a refusal to sell is a refusal to sell at all to certain persons with whom the respondents had previous unsatisfactory relations and a refusal ao sell ties without bagging at the opening of the market in* 1916 *and* 1917, *when there was fear that owing to the scarcity of ties and the prospect of large crops the marketing of the cotton crop might be endangered by speculators creating a corner in ties.* The evidence is that with those exceptions the respondents sold ties without any restrictions to all who wanted to buy *and indeed made extraordinary efforts to induce the manufacturers of ties to increase their output so that all legitimate dealers and all cotton raisers should get enough ties and bagging at reasonable rates to market their cotton.* It is only in these exceptional and individual cases, which establish no general practice affecting the public, that can sustain the findings in paragraph 4.

> As we think there was no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of American Manufacturing Co's bagging *and that the Commission had no jurisdiction to determine the wants of specific individual grievances the order is reversed.*"

It is from this order of the United States Circuit Court of Appeals that the Federal Trade Board appeals.

The respondents respectfully submit to this Court that the order of the United States Circuit Court of Appeals should be affirmed and submit in support the following

Argument.

As to the Order of the Trade Commission:

POINT I.

The order of the Trade Commission is in violation of the constitutional rights of the respondents (A) In that the said order deprived these respondents of their liberties and property without due process of law. (B) In that the order of the Trade Commission is in violation of the equal rights of the respondents before the law.

As to the Act of Congress creating the Federal Trade Commission:

POINT II.

The words "unfair methods of competition in commerce are hereby declared to be unlawful," as used in Section 5 of the Federal Trade Act, approved Sept. 26, 1914, have not changed or added to the substantive law, and the Trade Board has no jurisdiction over these respondents.

POINT III.

Section 5 of the Act of Congress approved Sept. 26, 1914, known as the Federal Trade Act is unconstitutional in that it purports to confer upon the Trade Commission judicial powers.

POINT IV.

Section 5 of the Act of Congress approved Sept. 26, 1914, is unconstitutional in that it purports to delegate to the Federal Trade Commission legislative powers.

As to the Findings of Fact:

POINT V.

There is no evidence to support the material findings as to the facts as found by the commission even assuming that it has jurisdiction.

POINT VI.

The commission has made no finding of fact that justifies in law the order of the commission directing respondents to desist from selling together in proportionate quantities ties and bagging even assuming the findings to be supported by the evidence and the Trade Commission to have jurisdiction.

As to the Investigation:

POINT VII.

Gross errors were committed by the examiner for the commission in the taking of testimony to the prejudice of the respondents.

POINT VIII.

The methods of investigation pursued by the commission in this case were unfair and disclose either personal prejudice against these respondents or a political propaganda.

POINT I-A.

The order of the Federal Trade Commission deprives these respondents of their liberty and property without due process of law.

The order of the Commission is

> "that Warren, Jones & Gratz, P. P. Williams "& Co. and C. O. Elmer, cease and desist "from requiring purchasers of cotton ties, to "also buy or agree to buy a proportionate "amount of American Manufacturing Com- "pany's cotton bagging, and further that *the "respondents cease and desist from refusing "to sell cotton ties unless the purchasers buy "or agree to buy from them corresponding "amounts of American Manufacturing Com- "pany's bagging, or any amount of cotton bag- "ging of any kind"* (fol. 53).

This court has held that:

> "In the absence of any purpose to create or "maintain a monopoly the Act (Sherman Law) "does not restrict the long recognized right of "trader or manufacturer engaged in an en- "tirely private business freely to exercise his "own independent discretion as to parties with "whom he will deal, and he may announce in "advance the circumstances under which he "will refuse to sell" (United States vs. Colgate "Co., 250 U. S., 300, 307).
>
> "The right to pursue any legitimate trade calling or profession subject only to such rea-

> sonable regulation in the interest of the public welfare as may be imposed on all persons under like conditions cannot be arbitrarily taken from them any more than their real or personal property can be taken from them" (Toppin vs. Dist. of Columbia, 22 App., D. C., 68.

The order of the Commission forbids these respondents from insisting on their right to sell their own property consisting of cotton ties and cotton bagging together. It is not pretended by the Commission that this order is made *in the interest of the public.* Nowhere is the evidence or the findings is it claimed that the trade methods of the respondents have caused any *injury to the public,* or an advance in the price of either of these commodities—quite the reverse for it appears that it has resulted in a lowering of the price (fols. 805, 833), and to that extent an advantage to the public—nowhere is it contended in the evidence or the findings that the respondents cornered the market, or lessened the production of either of these commodities but on the contrary it appears that they increased production and suffered a loss in so doing (fols. 777, 778-785, 786, 795, 805). Nowhere does it appear that they prevented their competitors from obtaining their fair share of the commodities they manufactured and marketed, but on the contrary it appears that they urged their competing tie makers to make more ties (fols. 785, 786), and they furnished their competing bagging makers with all the ties they required or demanded (pages 345, 346). *There is no evidence of and no finding to the effect that the respondents by selling ties and bagging together stifled competi-*

tion or created a monopoly or committed any other unlawful act. And it appears from the testimony of every witness who was examined not only that every other dealer and manufacturer of bagging sells his ties and bagging together "just like cups and saucers" but that the business cannot be economically conducted in any other way. An order to the manufacturers of locks to desist from selling locks and keys together would be as reasonable as this order to desist from selling cotton ties and cotton bagging together.

"That no general power resides in the Legis-
"lature to regulate private business, prescribe
"the conditions under which it shall be con-
"ducted, fix the price of commodities or serv-
"ices, or interfere with the freedom of con-
"tract we cannot doubt. *The merchant and*
"manufacturer, the artisan and the laborer
"under our system of government are left to
"pursue and provide for their own interests
"in their own way untrammelled by burden-
"some and restrictive regulations which how-
"ever common in rude and irregular times are
"inconsistent with constitutional liberty"
(People vs. Budd, 117 N. Y., 1-15).

"Indeed we may go a step farther and say
"that as property can only be legally acquired
"as between living persons by contract, a gen-
"eral prohibition against entering into con-
"tracts with respect to property, or having
"as their object the acquisition of property
"would be equally invalid" (Holden vs. Hardy, 169 U. S., 366.

The case of People vs. Gilson, 109 N. Y., 398, was a prosecution of defendant for selling coffee and giving a present to each purchaser of a certain quantity of coffee purchased.

The court in this opinion declaring unconstitutional the law under which he was convicted of a crime for so doing; say in a learned opinion by Peckham, J.,

> "Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the *right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation.* These principles are contained and stated in the above language in various cases, among which are Live Stock Association vs. Crescent City, etc., Co. (1 Abb. [U. S.], 388, 398); Slaughter House Cases (16 Wall., 36, 106); Matter of Jacobs (98 N. Y.), 98; Bertholf vs. O'Reilly (74 id., 509); People vs. Marx (99 id., 377).
>
> It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably

to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields. *By the provisions of this act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed by such legislation.* It is certainly lawful to sell (as in this instance) coffee. It is an article of food and is now almost one of the necessaries of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case, and that *while his profits on the same amount of coffee sold would be smaller then if he* gave no present, yet by the growth of his trade his income by the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. *He is thus restrained in the free enjoyment of his faculties, which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business or occupation, unless such restraint is necessary for the common welfare. This law interferes with the free sale of food, for the condition is imposed that no one shall sell food and at the same time, and as part of the transaction, give away any other thing.* It is

not material if by reason of the prohibition the owner's sales of food are greatly cut down and his ability to support his family thereby perhaps largely decreased. If the law is valid, the fact of its existence is a complete answer to the complaints of the owner of food, that his liberty to sell his property and his chance to make a livelihood are very greatly impaired.

It cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property by curtailing his power of sale, *and unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that result, the legislation is invalid as plainly violative of the constitutional provision under discussion.*"

People vs. Gillson, 109 N. Y., 398, 399, 407.

In Matter of Jacobs (98 N. Y., 28), the Court of Appeals construing a law making in unlawful to manufacture cigars in tenement houses says:

"In Butcher's Union Company vs. Crescent City Co. (111 U. S., 746), Field, J., says: That among the inalienable rights as proclaimed in the Declaration of Independence 'is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their

faculties so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms. *The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.'* In the same case Bradley, J., says: 'I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States,' of which he cannot be deprived without invading his right to liberty within the meaning of the Constitution. In Live Stock, etc., Association vs. Crescent City, etc., Company (1 Abb. U. S., 388, 398), the learned presiding justice, says: *'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor'.* In Wynehamer vs. People, Johnson, J., says: 'that a law which should make it a crime for men either to live in, or rent or sell their houses,' would violate the constitutional guaranty of personal liberty. In Bertholf vs. O'Reilly (74 N. Y., 509, 515), Andrews, J., says: That one could 'be deprived of his liberty in a constitutional sense without putting his person in confinement,' *and that a man's right to liberty included 'the right to ex-*

ercise his faculties, and to follow a lawful avocation for the support of life.'"

Matter of Application of Jacobs, 98 N. Y., 98-107.

In the case of *Wright* vs. *Hart*, 182 N. Y., 330, the N. Y. Court of Appeals construing an Act of the Legislature making sales in bulk of merchandise fraudulent as to creditors says:

"In the case at bar we are concerned with no quibbles of verbiage or technicalities of construction, but with the broad question whether an act of our legislature is repugnant to the 'iron rule' of our Federal and State constitutions that no citizen shall be deprived of 'life, liberty or property,' or be denied 'the equal protection of the laws.'

In the course of judicial interpretation, the words, 'liberty' and 'property' as used in the constitutions, have naturally and properly been given their most comprehensive signification, so that they embrace every form and phase of individual right that is not necessarily taken away by some valid law for the general good. *'The term 'liberty,' as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but it is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare'* (People vs. Marx, 99 N. Y., 377). 'All laws, therefore, which impair or trammel these

rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power), are infringements upon his fundamental rights of liberty, which are under constitutional protection.' (In re Jacobs, 98 N. Y., 98). 'Liberty,' * * * includes the right to make and enforce contracts (State vs. Loomis, 115 Mo., 307; Allgeyer vs. Louisiana, 165 U. S., 578). *The right to use, buy and sell property is protected by the constitution, and 'when the law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation,* and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power" (Wynehamer vs. People, 13 N. Y., 378, 398; People ex rel., Manh. S. Instn. vs. Otis, 90 N. Y., 48)."

Wright vs. Hart, 182 N. Y., 330-343.

"Freedom to contract was the essence of freedom from undue restraint on the right to contract."

White Ch. J. Standard Oil Co. vs. U. S., 221 U. S., 1-62.

A statute which prohibited persons engaged in mining and manufacturing from selling merchandise and supplies to their employees at a greater

percentage of profit than they sell to others not in their employ was held unconstitutional.

State vs. Fire Creek Coal Co., 30 W. Va, 188.

See, also,

Yick Wo vs. Hopkins, 118 U. S., 356;
Minnesota vs. Barber, 136 U. S., 313;
Allgeyer vs. Louisiana, 165 U. S., 578, 589, 590;
Powell vs. Pennsylvania, 127 U. S., 678, 684;
Butchers' Union vs. Crescent City, 111 U. S., 746-762;
Lochner vs. New York, 198 U. S., 45, 53;
Forster vs. Scott, 136 N. Y., 577-584;

In construing the statute the court should consider not alone what the Trade Commission *has ordered in the case at bar but what they might order* in any case where in their fallable judgment the merchant or manufacturer has been employing "unfair" methods of competition. A perusal of the reports of the commission will disclose many vicious cases of meddling with the business affairs of our merchants and manufacturers, e. g., inquiring into and restraining their salesmen from entertaining their customers. But even the meddling there disclosed will not reveal the full possibilities of the injury to business that may be done by energetic or dishonest busybodies and political opponents under the provisions of this Act.

"We are, however, of the opinion that there is another and broader ground upon which this statute should be declared invalid. *In discussing the constitutionality of this act, it is to be remembered that the question is to be determined not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority.* (Stuart vs. Palmer, 74 N. Y., 183; Gilman vs. Tucker, 128 N. Y., 190, 200.) When considered with that idea in view, it at once becomes obvious that this statute may be employed to confiscate to the state the entire property of an individual for the commission of a trespass upon the property of another, however slight, and this, too, although the owner is guiltless of any intended or actual wrong."

Colon vs. Lisk, 153 N. Y., 188, 194.

POINT I-B.

The order of the Commission is in violation of the equal rights of the respondents before the law.

If we understand the theory upon which the Commission claim to exericse a control over the conduct in trade of the respondents, it is because the respondents Warren, Jones and Gratz, who are the selling and distributing agents of the American Manufacturing Company for the sale of cotton bagging in the cotton growing States, and who are also the sole selling and distributing agents of the

Carnegie Company for their cotton ties in the same territory, have adopted the policy of so distributing these two products that they sell the same together in proportionate quantities of each. And while the only motive ascribed in their findings of fact by the Commission to the respondents in so distributing their products is "to force those dealers buying steel ties from the respondents to also buy at the same time from the respondents a corresponding amount of *American* bagging," yet, that this motive did not influence the Commission in making their order, is shown from the fact that the order made by the Commission provides that the respondents may not, in accordance with the universal custom in the trade, sell ties and bagging together in proportionate quantities *regardless of who manufactured either the ties or the bagging.* This conclusion is strengthened by the reflection that the respondents, P. P. Williams & Company, who are general merchants selling over seventy different articles, embracing other ties than those of Carnegie Company's make, and other bagging than that of American Manufacturing Company's make, *may not sell together ties of any make with bagging of any make.*

The order of the Commission, therefore, is that all of these respondents must cease and desist from doing acts which are not unlawful, acts which every other trader or manufacturer in the country may do without let or hindrance and which every other manufacturer and trader in the country who deals in ties and bagging, has been doing from time immemorial, and which every witness examined by the Commission has testified is the only way in which the business can be successfully conducted.

Korndorfer testified he knew of no dealer who sells one without the other. "They go together like cups and saucers" (p. 62, fol. 127). W. M. Foster testified: "You can not sell ties without bagging" (p. 124, fol. 276, p. 130, fol. 291). "One without the other is no good" (p. 133, fol. 298). J. C. Werner: "That is the way the business is done" (p. 168, fol. 382). John I. Jenkins: "We think that you understand that we could do very little with bagging without ties" (p. 230, fol. 533), "without ties will not be able to sell bagging that is all" (p. 231, fol. 535). Benj. Margolius: "The trade would not buy one without the other" (p. 240, fol. 557). W. P. Gohlson says: "Did not sell bagging because I had no ties to match. Could not sell one without the other" (p. 217, fol. 501). The railroads recognizing the custom of the trade make special rates for combination shipments by the pattern (p. 350). The method was universal in the trade.

The order of the Commission would prevent these respondents from doing what every other free American citizen may freely do and deprives these respondents of their constitutional right to the equal protection of the law with their fellow citizens.

> "The equal protection of the law means equality of opportunity to all in like circumstances, and that classification to be valid must not be arbitrary and discriminate against persons without a basis of reason. These principles have become familiar from frequent statement in the decisions and need no citation nor discussion of the cases here. They

have become constituent elements in our popular form of government. The very nature of our free government forbids that a man should be compelled to refrain from acts which the law permits."

Hauser vs. North British Ins. Co. (206 N. Y., 453, 462).

"No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Gulf, Colorado & St. P. R. R. vs. Ellis, 165 U. S., 150, 165.

Cotting vs. Kansas City Stock Yds., 183 U. S., 79.

"The equal protection of the law requires that the same methods and means be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances."

Kentucky R. R. Tax Cases, 115 U. S., 321, 337.

Connolly vs. Union Pipe Co., 184 U. S., 540.

Yick vs. Hopkins, 118 U. S., 356.

People vs. Marx, 99 N. Y., 377-386.

Janesville vs. Carpenter, 77 Wis., 288, 301.

Powell vs. Pennsylvania, 127 U. S., 678.

Missouri vs. Lewis, 101 U. S., 22, 31.

POINT II.

The words in the Federal Trade Act "unfair methods of competition in commerce are hereby declared unlawful" have not changed or added to the substantive law.

In construing the Sherman Law in the Tobacco Case, Mr. Chief Justice White said:

> "The Act of Congress must have a *reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have directly or remotely some bearing on interstate commerce and possibly to restrain it.*"
>
> United States vs. American Tobacco Co., 221 U. S., 106-179.

Section 5 of the Federal Trade Act says that "unfair methods of competition in commerce are hereby declared unlawful." The act does not say "all" unfair methods, nor does it define what acts constitute the "unfair" methods that are declared to be "unlawful." The word "unfair" and "unlawful" are both generic terms. The courts have construed their meaning variously according to the varying circumstances that have arisen in the multitudinous affairs of human intercourse. Certainly all competition is not unfair. Competition is said to be the life of trade, and methods of competition that are often very "unfair" to the individual and even to a class, and from his and their point of view extremely "unfair," may be for the advancement of the interests of the

public. If the public, then, are benefited by the methods of competition no matter how "unfair" these methods may be to the individual who suffers from them, such methods of competition are not "unlawful."

And the Congress may not by law prohibit these methods, for it would be a discrimination against the individual in the doing of a lawful act, and would be a denial to him of the equal protection of the law. To such cases the courts have applied the rule, *"damnum absque injuria."* Therefore, all competition is not unfair and all "unfair" competition is not "unlawful." If the public be unconcerned in the methods of competition and the methods of competition be so "unfair" as to trespass upon the rights of other persons, causing them individual injury, these acts usually called *torts* may be "unlawful" and courts of equity have restrained their continuance, and damages for their commission have been awarded by courts of law.

But inasmuch as the public are not interested in the repression of these unlawful acts, and as the Trade Commission is authorized to institute proceedings only when *"it would be to the interest* of the public" it cannot be that this class of "unfair" methods of competition in commerce, which though "unlawful," was meant by the Congress to be brought within the provisions of Section 5 of the Federal Trade Act. Therefore *this last class of practices which embrace methods of competition in commerce at once both "unfair" and "unlawful" does not come within the purview of the act*, and the terms employed in the act are not of universal application. There is but one other class of methods in commerce which are both "unfair" and "unlawful," to wit: methods which involve an injury to the

public—methods which restrain trade, stifle competition and create monopolies. These methods were already known to the law when the Federal Trade Law was enacted. They were contained in the Sherman Law and the several anti-trust laws, which were comprehensive enough to embrace all those "unfair" methods of competition which could under any and all circumstances be considered by the trade commission as "unlawful," and subject to its jurisdiction.

In United States vs. Keystone Watch Case Co., 218 Fed., 502-515-516, McPherson J., referring to the Sherman Law said:

> "The Act of 1890 is directed against, restraint of interstate or foreign trade. * * * Trade may be restrained in many ways and by many devices *but these are all covered* by the first and second sections of the act. In these sections two classes of prohibited acts are described: (1) the concerted action of two or more persons, which may take the form of a contract, a combination in whatever form, or a conspiracy; and (2) monopoly or the attempt to monopolize which may be the act of one person alone or more than one. *These two classes are intended to be all embracing, and thus far in the history of the statute no variety of device has escaped their sweep.*"

And if the Congress intended when it passed the Federal Trade Act to make acts and practices "unlawful" other than and in addition to those already known to the law as "unfair methods," constituting "unlawful" restraint of trade, surely Congress would have expressed and defined them.

This the Congress not only refrained from doing, but the very provisions of the act negative the presumption that they intended so to do.

Though the act by Section 4 gives numerous definitions of the terms used therein it is ominously silent as to what it meant by the words "unfair methods of competition" and if it intended to add to the substantive law by including within its nomenclature a new set of "unfair methods" not theretofore included, and which thereafter would be "unlawful," surely the Congress would have said so.

That the Congress had in mind the possibility of the meaning of the terms "unfair methods of competition" being misunderstood, and negatived the idea that it intended making new substantive law, is shown by Section 11, which provides, "nor shall anything contained in the act be construed to *alter, modify or repeal* the anti-trust Acts, or the Acts to regulate commerce or any part or parts thereof." The closest scrutiny of the Act will fail to show any terms in the whole act to which this provision contained in Section 11 could possibly apply other than to the words "unfair methods of competition in commerce are hereby declared unlawful" contained in Section 5 of the Act, and does not the employment of these terms "alter" "modify" "repeal" show an intention on the part of the Congress not to enlarge the scope of the unlawful acts?

And that the Congress intended by this provision to limit the application of the Act to the then existing law is further evidenced by this. The Federal Trade Commission Act was passed September 26th, 1914. On October 15th, 1914, the Congress passed what is known as the Clayton Act, entitled

"An Act to *supplement* existing laws against unlawful restraints and monopolies." The Clayton Act enumerates a variety of acts which constituted "unlawful methods of competition" and specifically gives jurisdiction to the Federal Trade Commission to investigate and enforce the law concerning them (Sec. 11). These "unlawful methods" embrace "discriminations in price between purchasers of commodities, *where the effect of such discrimination may be to substantially lessen competition or to create a monopoly in any line of commerce*" (Sec. 2); "to lease or make a sale or contract for goods, wares, merchandise, machinery, supplies or other commodities * * * or to fix a price therefor or discount therefrom or rebate upon such price or condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale may be substantially *to lessen competition or tend to create a monopoly in any line of commerce*" (Sec. 3); "no corporation engaged in commerce shall acquire the whole or any part of the stock or other share capital of another share corporation also engaged in commerce, where the effect of such acquisition may be to substantially *lessen competition or tend to create a monopoly*" (Sec. 7). These include all the methods of competition" thus set forth in the Clayton Act "unfair methods of competition in commerce"? And if the Federal Trade Commission Act was intended to embrace them, why was the Clayton Act passed to "*supplement*" it? That the Federal Trade Commission Act like the Clayton Act applied only to the suppression of practices

that tended to stifle competition and to create monopolies is evident, for investigations conducted by the Commission are limited to those cases "where a proceeding by it in respect thereof would be to *the interest of the public*" (Sec. 5, Federal Trade Act); and the public are only interested in those cases where their rights are apt to be injured.

In the judicial interpretation of law the opinions of the law-makers have no weight with the courts.

> United States vs. U. P. R. R., 92 U. S., 72, 79.

Congress, therefore, has not changed the substantive law by the passage of the Federal Trade Commission Act.

The inquisitory powers of the Federal Trade Commission, therefore, are confined entirely to the "unfair methods of competition in commerce" made "unlawful" by the Sherman Law, the Clayton Act and the several anti-trust laws, and do not embrace those multitudinous "unfair methods" which the courts take jurisdiction over, classified under the name of torts, and the Federal Trade Commission may not investigate nor make orders concerning them.

It was not the intention of the Congress to give to the Federal Trade Commission a roving commission to examine every merchant and manufacturer where salesmen give a box of cigars or a dinner to the customer's buyers, and order them to desist from so doing.

POINT III.

Section 5 of the act creating the Federal Trade Board is unconstitutional in that it purports to confer upon the board judicial powers.

The Trade Commission is not an administrative body like the Commerce Commission. Its functions are inquisitorial not judicial. The Congress may not confer judicial powers on a non-judicial body.

It was to prevent the creation of just such inquisitorial bodies as the Trade Commission that the inhibitions on the power of Congress were inserted in the Constitution.

> "In Magna Charta they were wrested from "the King as restraints upon the power of the "crown. With us they were imposed by the "people as restraints upon the power of the "Legislature."
>
> Wynehamer vs. People, 13 N. Y., 378-382.

The 3rd provision of the English Bill of Rights of 1689 was as follows:

> "3rd. That the commission for erecting the "late Court of Commissioners for ecclesiastical "causes and other commissions and courts of "like nature are illegal and pernicious."

Article III, Section 1 of the Federal Constitution provides that

"the judicial power of the United States shall "be vested in one Supreme Court, and in such "inferior courts as the Congress may from "time to time ordain and establish."

"Section 2. The judicial power shall extend "to all cases in law and equity arising under "the Constitution and the laws of the United "States * * * to controversies to which the "United States may be a party."

The judges of these courts are not appointed by the Congress nor subject to its will. Even the powers of the Federal Judges are restricted by the Seventh Amendment, which provides "In suits at common law where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved."

Section 5 of the act creating this commission is a usurpation by the Congress of the judicial power. It casts upon what concededly is not a judicial body functions that under the foregoing provisions of the Constitution belong exclusively to the courts. Section 5 of the act provides, among other things, for the following judicial acts: the service of a complaint, the receipt of an answer thereto, the service of subpoenas and the examination of witnesses; *the weighing of evidence;* the making of *findings of fact* and *conclusions of law;* and the service of an injunction order restraining the defendant

"if upon the hearing *the commission shall be* "*of the 'opinion' that the methods of competi-* "*tion in question is prohibited by this act.*"

The act further provides that

> "the findings of the commission as to the facts *"if supported by testimony shall be conclusive."*

In the case at bar, these commissioners never examined and never saw a single one of the witnesses who testified. They probably never even examined the record—For they found as one of the facts of the case exactly as was recommended by their examiner wherein his arithmetic was wrong, viz.: in his finding in paragraph three "that "Carnegie Steel Co. manufactures 75% of all the "steel ties manufactured for such purpose," whereas the only evidence in the case, and that produced by the examiner of the commission and his lawyer, viz.: the figures from the books of the steel companies show a much smaller percentage. Yet the commission is empowered to and does by their findings declare the respondents guilty of an unlawful act in violation of the provisions of the Federal Trade Act, and are empowered to, and do make an order depriving these respondents of their liberty to freely contract, and to enjoy the profits of these business. And these findings of fact *are "conclusive" on this court if "supported" by testimony."* If such be the law, neither this court nor the Circuit Court of Appeals may find that the Carnegie Steel Co. made but 59% of the *new* steel ties and 40 3/10% of *all* the steel ties made in the country in 1916, although the undisputed figures supplied by the commission's own witnesses show this to be so, because the commission has found as a *fact* that Carnegie Co. manufactured 75% of all the ties manufactured and *there is testimony to "support" that finding.*

In every jurisdiction where the question has been raised, it has been held that the weighing of evidence *is a judicial function* and that legislation further than making certain facts *prima facie* evidence is an invasion of the judicial power vested in the courts.

It has been held that the Legislature may not make tax deeds conclusive evidence of the title of the grantee or of the contents thereof.

Marx vs. Hawthorn, 30 Fed. R., 579, 585, 587.
Banon vs. Bearns, 39 Fed. R., 892-895-896.
Cooleys' Const. Lim., 6th Ed., 452-453.
Grosbeck vs. Seeley, 13 Mich., 329.

That the legislature may not prescribe what evidence is conclusive has been held in

White vs. Flynn, 30 Ind., 46.
Corbin vs. Hill, 21 Ind., 70.
Wantlan vs. White, 19 Ind., 470.
People vs. Lyon, 27 Hun, 180-182 (N. Y.).
Kelly vs. Herall, 10 Sawyer, (U. S.), 161, 169.
Jamesville vs. Carpenter, 77 Wis., 288-301.
King vs. Dedham Bank, 15 Mass., 447.
Chicago R. R. vs. Minnesota, 134 U. S., 413.
United States vs. Klein, 13 Wallace (U. S.), 128, 146, 147.
L. R. & F. R. R. vs. Payne, 33 Ark., 816.
Meyer vs. Berlandi, 39 Min., 438.
Felix vs. Wallace, 62 Kans., 667.

Making contents of bills of lading conclusive evidence of correctness of shipment held unconstitutional.

Missouri R. R. vs. Simonsen, 64 Kans., 802.

In reviewing the judgments of the State Courts on a writ of error this court has held that it may examine the entire record, including the evidence to determine what purports to be findings of fact:

"While it is true upon a Writ or Error to "a State Court we can not review the decision "upon pure questions of fact *but only on ques-* "*tions of law* it is equally true that we may "examine the entire record including the evi- "dence, if properly incorporated therein, to "determine what purports to be a finding upon "questions of fact is so involved with and de- "pendent upon such questions of law as to be in "substance and effect a decision of the latter."

Kansas City S. R. vs. Albers Co., 233 U. S., 573, 591.
Mackay vs. Dillon, 4 How., 421, 447.
Dower vs. Richards, 151 U. S., 658, 667.
Stanley vs. Schwalbey, 162 U. S., 255, 74, 77, 79.
Schlemmer vs. Buffalo, 205 U. S., 1.
Cedar Rapids Gas vs. Cedar Rapids, 233 U. S., 655, 669.
Graham vs. Gill, 223 U. S., 643.
Oregon R. R. Co. vs. Fairchild, 224 U. S., 510, 528.

In the case at bar the findings of fact in some instances are really conclusions of law, e. g., the finding as to "the purpose and effect" of the conduct of respondents; that the respondents "adopted and practised a policy"; that respondents "had what amounted to a monopoly of the cotton tie business" and finally that the methods of the respondents were "unfair methods of competition • • • in violation of Section 5 of the Federal Trade Act."

SECTION 5, DESTROYS THE RIGHT TO A TRIAL BY JURY.

May the members of this Commission without themselves seeing or examining a single witness make a finding of fact which declares these respondents guilty of an unlawful act and penalize them therefor and such finding of fact be *conclusive on all our Courts* and there be no judicial review of that finding even though a most cursory examination of the record discloses that such finding is erroneous. If so of what avail are those provisions of the constitution declaring that the judicial power in all cases in law and equity shall be vested in the Courts, and that all questions of fact in criminal causes, and in all suits at common law in which the amount exceeds in value twenty dollars shall be determined by a jury?

The provision in the constitution of the State of New York is not nearly so broad as the provisions of the Federal Constitution. It is "the trial by jury in all cases in which it has heretofore been used shall remain inviolate."

In a case arising out of a statute authorizing State game protectors to seize and condemn before

a magistrate without a jury a sloop engaged in destroying oysters, the N. Y. Court of Appeals held:

> "In considering this case, we deem any extended discussion of the question of the invalidity of the statute, because it deprived persons affected by it of the right to a trial by jury, unnecessary, in view of its exhaustive and satisfactory examination by the Court below. Section two of article one of the Constitution, which insures a trial by jury in all cases in which it has heretofore been used, was under consideration by this court in the case of Wynehamer vs. People (13 N. Y., 378, 426). It was there said that that provision does not limit the right to mere instances in which it has heretofore been used, but extends it to such new and like cases as may afterwards arise. That principle was also recognized in People ex rel. Comaford vs. Dutcher (83 N. Y., 240, 242). The doctrine that the jury trial referred to in that provision means a trial by a commonlaw jury of twelve men, was also asserted in the latter case, and Hill vs. People (20 N. Y., 363) and the Wynehamer case were referred to as sustaining it. Therefore, if the right to a trial by jury existed in similar cases at the time of the adoption of the Constitution, then clearly this statute was invalid, for the reason that it in no way provided for such a trial, either in the trial court or upon appeal. That the forfeiture of property used in violation of this statute is in effect a penalty we have no doubt. We regard it equally clear that suits to enforce forfeitures or penalties have

been generally tried by a jury. Consequently, as the statute under consideration makes no provision for such a trial, but provides another exclusive method, it is in conflict with the provisions of section two of article one of the Constitution of the State. Wood vs. City of Brooklyn, 14 Barb., 425, 432; Warren vs. People, 3 Parker, 544).

Colon vs. Lisk, 153 N. Y., 188, 193, 194).

"The term 'Common law' as used in the Con-
"stitution is in contradistinction to admiral-
"ty, maritime and equity jurisdiction and
"may in a just sense be sustained to *em-*
"brace all classes of litigation which are not
"of equity or admiralty jurisdiction whatever
"particular form they may assume to settle
"legal rights."

Parsons vs. Bedford, 3 Peters (U. S.) 433, 446.

It includes proceedings to enforce forfeitures and penalties.

The Sarah 8 Wheaton (U. S.) 391;
Graves vs. N. P. R. R., 5 Mont., 556.

If the courts provided for in the Constitution may determine questions of fact only in equity and admiralty jurisdiction, who will say that this purely investigating body, political in its complexion, may determine without review or appeal, questions of fact which make lawful acts unlawful, and impair the obligation of contracts, which even the sovereign states are inhibited from doing?

The Interstate Commerce Act and the Federal Trade Act are not analagous.

The Interstate Commerce Act placed under the supervision of a federal board the interstate public carriers—*and only in so far as their public service functions are concerned.* It is purely administrative measure exercised only over the administrative functions of public carriers which come within the administrative powers of the Congress. But in the manner in which the railroad choose, for instance, in disposing of their cast off equipment their personal property not used for the public service, will this court maintain that the Interstate Commerce Act has any application? The respondent's are selling their own personal property, they are selecting their own customers and their own way of disposing of it, *and they have done no injury to the public* in so doing. Counsel for petitioner confuses the interests of the individual with that of the public. The United States as *parens patriae* may not assume the guardianship of every individual who has a grievance and become his champion, as counsel suggests at page 27 of his brief in citing what Mr. Justice Pitney said in Hichman Coal Co. vs. Mitchel, 245 at page 259. In every case decided by the courts construing the provisions of the Interstate Commerce Act this court has clearly called attention to the administrative features of the act.

When the question of the weight of evidence and the power of the commerce board to make findings of fact was up for review. We quote from a number of the cases, all of which are cited by the learned counsel for the petitioners in his brief.

"But the statute gave the right to a full "hearing, and that conferred the privilege of "introducing testimony, *and at the same time "imposed the duty of deciding in accordance "with the facts proved.* A finding without "evidence is arbitrary and baseless, and if the "government's contention is correct, it would "mean that the commission had a power pos- "sessed by no other officer, administrative body "or tribunal under our government. It would "mean *that where rights depended upon facts, "the commission could disregard all rules of "evidence, and capriciously make findings by "administrative fiat.* Such authority, however "beneficially exercised in one case, could be "injuriously exerted in another; is inconsistent "with rational justice, and comes under the "Constitution's condemnation of all arbitrary "exercise of power."

Int. Comr. Comms. vs. L. & N. R. R., 227 U. S., 88, 91.
Int. Comr. Comms. vs. N. P. R. R., 216 U. S., 538, 544.
Manufacturers' Ry. Co. vs. United States, 246 U. S., 457, 482.

The findings of fact of the Interstate Commerce Commission are conclusive upon the Courts *only in so far as they are administrative.*

"It may be conceded that the evidence would "have warranted a different finding. Indeed "the first report of the Commission was to the "contrary. But to annul the commission's "order on that ground would be to substitute

"the judgment of the court for the judgment "of the commission, *upon a matter purely ad-* "*ministrative,* and this can not be done (cases cited)."

Manufacturers Ry. Co. vs. United States, 246 U. S., 457, 482.

The Interstate Commerce Commission having power to establish through routes and joint rates when no reasonable or satisfactory through rate exists, this court held, Harlan, J.:

"We are of the opinion that the Commission "had no power to make the order if a reason- "able and satisfactory route already existed, "and that "*the existence of such a route may* "*be inquired into by the Courts.*"

Interstate Comm. Com. vs. N. P. R. R., 216 U. S., 538, 544.

"Such orders *so far as they are administra-* "*tive* are conclusive. * * * They are quasi "judicial and are only prima facie correct in so "far as they determine the fact and amount of "damage."

Mitchel Coal Co. vs. Penn. R. R., 230 U. S., 247, 258.
Penn R. R. vs. Inter Coal Co., 230 U. S., 184, 196.

POINT IV.

Section 5 of the act is invalid also because it purports to confer upon the Trade Commission legislative powers.

Section 5 says "Unfair methods of competition in commerce are *hereby* declared *unlawful.*" What these unfair methods are is not defined. The commission is authorized to investigate whenever it has *"reason to believe"* that any person is using "unfair" methods of competition, and it shall *"appear"* to the commission that an investigation would be *"to the interest of the public."*

And if upon such hearing "the commission shall be of the *opinion* that the *method* of competition in question *is prohibited by this Act,"* that is, if in the opinion of the commission the methods of competition are *"unlawful."*

That is, the commission in its *discretion* may declare "unlawful" what was not so before, what may not be so thereafter, what may be so in Maine and not so in Georgia. It may declare as it has in this case at bar that what Warren Jones and Gratz are doing is unlawful but that it is lawful for all other merchants and manufacturers to do the same thing.

This is a delegation to the Trade Commission of the law making function which belongs only to the Congress, and which Congress may not delegate.

In Union Bridge Co. vs. United States (204 U. S., 364, 382), this Court in an opinion by Harlan, J., says:

"The true distinction as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between the delegation of the power to *make* the law, which necessarily involves *a discretion as to what it shall be,* and conferring authority *or discretion as to its execution* to be exercised under and in pursurance of the law. *The first cannot be done;* to the latter no valid objection can be made Cincinnati, Willmington R. R. vs. R. R. Commission, 1 Ohio St., 77.)'

Union Bridge Co. vs. United States, 204 U. S., 364, 385.
Fields vs. Clark, 143 U. S., 649, 692.
Chinese Exclusion Cases, 130 U. S., 581, 609.

POINT V.

THE FINDINGS AS TO THE FACTS.

There is nothing in the findings as to the facts to justify the order of the Commission assuming that the Commission has jurisdiction.

The Commission has found as a Conclusion of Law: "That the *methods of competition set forth in the foregoing Findings as to the Facts* in Paragraphs 1, 2, 3 and 4 and each of them are under all the circumstances therein set forth *unfair methods of competition against other manufacturers, dealers and distributors of jute bagging;* and against other *dealers* and *distributors* in the

material known as sugar bag cloth; and against *dealers, manufacturers and distributors* of the bagging known as *rewoven* bagging and second-hand bagging in violation of the provisions of Section 5 of An Act of Congress, approved September 26, 1914, entitled 'An Act to Create a Federal Trade Commission, etc.' "

Assuming, but not conceding, that there is evidence to support the Findings as to the Facts made by the Commission, the closest scrutiny of the Findings as to the Facts will disclose no Findings of Fact that support this sweeping Conclusion of Law of the Commission. The following is a brief but complete recital of all the material Findings:

PARAGRAPH ONE: That the respondents are all engaged in interstate commerce in the sale and distribution of cotton ties, and for such purpose the respondents, P. P. Williams Company and Elmer, are general agents for respondents, Warren, Jones & Gratz, who are the general selling and distributing agents of Carnegie Company, *manufacturers* of cotton ties. That Warren, Jones & Gratz, are the general selling and distributing agents of American Manufacturing Company for the sale and distribution throughout the cotton States of jute bagging for covering cotton; that Mente & Company and many others *sell and distribute* a material known as sugar cloth used for wrapping cotton; that the Carolina Bagging Company *manufactures, sells and distributes* "what is known as rewoven bagging" (which, we will assume but which is not so found, is used for covering the cotton crop); that the "said material known as rewoven bagging *is manufactured and sold*" by

other "corporations and co-partnerships in interstate commerce."

PARAGRAPH TWO: "That within three years last past the respondents adopted and practiced the policy of refusing to sell ties to those *merchants and dealers* who wished to buy from them unless such *merchants and dealers* would also buy from them a corresponding amount of jute bagging. The purpose and effect of said policy was to force those *dealers, merchants and jobbers* who wished to buy steel ties from the respondents, to also buy at the same time from the respondents a corresponding amount of American Bagging *manufactured* by American Manufacturing Company of which company Warren, Jones & Gratz are the sole selling and distributing agents west of the Mississippi River."

PARAGRAPH THREE: That the Carnegie Company manufactures and sells annually about seventy-five (75%) percent of all the steel ties manufactured for binding bales of cotton in the United States, *and sufficiently "dominates" the cotton tie situation* in the United States to *"enable" it to fix and control the price of such ties* throughout the country. That forty-five (45%) percent of the jute bagging required to cover the cotton crop is *manufactured* by American Manufacturing Company; twenty (20%) percent by Ludlow Associates and thirty-five (35%) percent is made from second-hand bagging and sugar cloth.

PARAGRAPH FOUR: That a great many *merchants, jobbers and dealers* in bagging and ties

were *many times* unable to procure ties from any other persons than the respondents. That the respondents *sold such a large proportion* of the entire amount of such ties manufactured and sold that they had *what amounted to a monopoly* of the cotton tie business of the country, *controlling and distributing such a large portion of the entire output of cotton ties, that cotton growers found it impossible to bind the cotton produced without purchasing from the respondents almost the entire output of such cotton ties manufactured by the Carnegie Company,"* and "that the *dominating position* occupied by the respondents in the sale and distribution of cotton ties made it *possible* for them to force would, be purchasers of ties to also buy from them bagging manufactured by American Manufacturing Company, and in *many instances* respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging and such purchasers were *oftentimes* compelled to buy bagging manufactured by American Manufacturing Company from the respondents in order to obtain a sufficient amount of cotton ties" (Finding Four, fols. 189-192).

We respectfully submit that under the worst possible aspect from which these findings are viewed there is nothing in them that warrants the Conclusion of Law made by the Commission that they set forth "unfair methods of competition against other *manufacturers, dealers and distributors* of jute bagging and against other *dealers and distributors* in the material known as sugar bag cloth, and against *manufacturers,* dealers and distributors of rewoven and second-hand bagging, in violation of the provisions of the Federal Trade Act."

It is true as found by the commission that the respondents "sold a large proportion of the entire amount of the cotton ties manufactured" and that "the cotton growers found it impossible to bind the cotton produced without purchasing from the respondents almost the entire output of such cotton ties manufactured by the Carnegie Co." It is also true what the commission *has not* found but what *the evidence discloses*—that Mr. Anderson Gratz urged the Carnegie Co. to produce more ties for the respondents to sell in 1916 and 1917, and that it was because of respondent's insistence that Carnegie Co. did produce 65% of all the new ties made in 1917 whereas the Carnegie Co. had produced but 56% thereof made in 1915. And it is also true that all the steel companies other than the Carnegie Co. made fewer ties in 1917 than in 1916, and fewer in 1916 than in 1915, which gave to the respondents that *"dominating position in the sale and distribution of cotton ties"* which the commission has found they possessed.

But

> *"magnitude of business does not alone con-*
> *"stitute a monoply nor effort at magnitude*
> *"an attempt to monopolize."*
>
> United States vs. Standard Oil Co., 173 Fed., 177, 195.

"A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within it" (i. e., Sherman Law).

> Patterson vs. United States, 222 Fed., 599, 619.

"We think it no more than reasonable to say "that when a large business has proved itself "to be beneficial and not harmful to the com- "munity, *it should not be condemned merely "because it is large.*"

United States vs. Keystone Watch Case Co., 218 Fed., 502-518.

Had the respondents limited their output or increased the price of cotton ties they would have been guilty of monopolizing the market.

United States vs. International Harvester Co., 214 Fed., 987-1005.

But the respondents did just the opposite, they increased their own output, urged their competitors to increase their production and lowered the price of ties to the consumer.

"The size of the business is not in itself a "violation of the law and should carry with it "no great weight. * * * The evil is not the "enlargement of the trade of one person but "the destruction of the trade of all others in "the same commodity."

United States vs. American Naval Stores, 172 Fed., 455-458;
Uuited States vs. U. S. Steel Corp., decided by this court March 1, 1920.

Apart from the utter variance between the evidence and the Findings of Fact made by the Commission the most significant observation regarding

them is: the "Facts" the Commission omits to find, and the Conclusion the Commission refuses to deduce.

For example: The Commission finds as facts that the only *competitors* of the American Manufacturing Company in the manufacture of bagging are the Ludlow Associates who manufacture twenty (20%) per cent. of the new bagging (the American Company manufactures forty-five (45%) per cent. of the new bagging); the Carolina Bagging Company, which manufactures rewoven or second-hand bagging; and that "rewoven bagging is manufactured and sold by other corporations and co-partnerships in interstate commerce." These unnamed manufacturers as far as the evidence in the case discloses are pure figments of the imagination. But whosoever they are, they, with the Carolina Bagging Company and the Ludlow Associates are the only *manufacturers* of bagging who are found by the Commission to be *competitors* of the American Company; and it must be to them that the Commission concludes as a matter of law that the methods of the respondents Warren, Jones & Gratz, as agents of the American Company, in distributing their bagging with ties in proportionate quantities, are "unfair methods of competition" under the terms of the Federal Trade Commssion Act.

Yet the Commission makes no finding that the respondents or either of them refused to sell or attached any condition to the sale of their cotton ties to the *manufacturers* of either new or rewoven cotton bagging; and they *omit to find* the very important fact essential to the proper determination of this inquiry, and which is shown by an abundance of uncontradicted credible evidence in

the case, *that the respondents did sell and deliver to each and singular the manufacturers of bagging for distribution with their cotton bagging all the cotton ties they required,* and enough to cover all they manufactured and at the same price paid by American Manufacturing Company. Evidence to this effect was supplied as to the Ludlow Associates and the Carolina Bagging Company, named in the Commission's Findings, as well as to the Federal Sugar Company, and to Young & Metzner, who supplied the sugar bag cloth to Mente & Co. manufacturers of sugar cloth bagging who are not therein named (fols 800, 801 pages 345, 346, 421, 422).

Nor does the commission make any finding as to the fact which the uncontradicted evidence discloses that both the Ludlow Associates and the Carolina Company, as well as Young & Metzner and the Federal Sugar Company, practice the selfsame method of distributing their bagging and ties together as is practiced by these respondents as agents of American Manufacturing Company.

Nor does the commission make any finding that this custom has prevailed in the trade for many years, as being testified by every single witness examined, and that several of the witness testified that "the business could not be conducted in any other way" W. M. Foster (fols. 276,291, 298), W. P. P. Goldson (Secty. of Carolina Co. (fol. 501), J. C. Werner, of Mente & Co. (fol. 382), John J. Jenkins (fols. 533, 535), Benj. Margolina, fol. 557).

The commission also finds that the same policy was adopted and practiced with "merchants, dealers and jobbers" and that the "*purpose* and effect of said policy was to force those merchants, deal-

ers and jobbers who wished to buy steel ties to also buy at the same time from the respondents a corresponding amount of bagging manufactured by American Manufacturing Company" (Paragraph Two, Findings as to Facts), and "the dominating and controlling position occupied by the respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties to also buy bagging manufactured by American Manufacturing Company," and in *many instances* said respondents refused to sell ties unless the purchaser would also buy a corresponding amount of bagging and such *purchasers were oftentimes compelled* to buy bagging manufactured by American Manufacturing Company (Paragraph Four, Findings).

The foregoing Findings are singularly barren of any facts showing the commission of any unlawful act on the part of the respondents. And this court will not presume that the respondents have committed an unlawful act where an innocent construction may be placed on their conduct.

Assuming, but not conceding, the truth of the finding that the "*purpose*" of the respondents was to compel *merchants, dealers and jobbers* to buy American Bagging with the ties they offered for sale; and that in "*many instances*" they refused to sell ties without bagging; and that "such merchants and jobbers were '*oftentimes*' compelled to buy American Bagging in order to procure ties," who will say that this constituted an unlawful act? Non constat—, *in the absence of a contrary finding, the purpose and the conduct of the respondents in that respect may have been both legal and praiseworthy.* Who were the "merchant dealers and

jobbers" whom the respondents refused to sell the ties without the bagging? Why did they desire to purchase one without the other? Did they desire to corner the market in ties? Why did the respondents, who furnished all the *manufacturers* with all the ties they required to go with their bagging, refuse to sell these alleged "dealers and jobbers" ties without bagging? *If they had bagging and no ties why did they not procure their ties from the manufacturer of the bagging who had been supplied with sufficient ties to go with their bagging*? Did these jobbers get ties from the manufacturers when they bought their bagging and sell their ties to a speculator at an advanced price, and then come back for more ties, as did Boren & Stewart, whose manager Chas. M. Platter was one of the principal witnesses for the commission (fols. 212, 216, 217)?

How are the "public's interest promoted" by such solicitude for these unnamed "jobbers and dealers"? They were not *competitors* of the respondents, for the respondents are manufacturers' agents and "competition in interstate commerce could not be stifled or a monopoly created" by any conduct of the relators towards them.

The commission has made no finding that the relators' conduct in trade lessened or stifled competition or tended to create a monopoly in interstate commerce, and in their conclusion of law exculpate the respondents from that charge.

Then what unlawful act were they guilty of?

If as the Commission has found "that a great many merchants, jobbers and dealers in bagging and ties were many times unable to procure ties

from any other persons than the respondents," and "that the respondents controlled and *distributed* such a *large portion of the entire output* of cotton ties that cotton growers found it *impossible to bind the cotton* grown and produced in the United States *without* applying to and *purchasing* from the respondents and their agents *almost the entire output of such ties manufactured by the Carnegie Company*" (Paragraph Four, Findings as to Facts), does it not follow as a corollary that it was the duty of the respondents, who were distributors of bagging as well as distributors of ties, to so distribute the cotton ties that they would go with the cotton bagging, and so distribute the cotton bagging that it would go with the cotton ties, to the end that the consumer of both commodities would not only get the benefit of the cheapest method of transportation and handling, but that he would be certain to get the proper proportion of both commdities and *it would not be in the power of any "dealer or jobber" to buy up an undue quantity of either commodity and thereby greatly advance the price thereof to the consumer.*

This is exactly what was done by the "dealers and jobbers" whom the Commission used as witnesses. The witness, Chas. M. Platter was the employee of Boren & Stewart. The respondents sold them ties in quantities more than sufficient to go with their bagging. They sold these ties without bagging at a profit to M. M. Graves, of Graves & Company, who on a short market created by himself and several other "dealers and jobbers" turned over a profit of $100,000 on ties so cornered and stood to make profits twice as large if the respondents had not refused to sell him and these other

speculative jobbers ties without a proportionate amount of bagging.

The Commission fails to make any finding showing how or in what manner the method of doing business was in any manner "unfair" to either these *manufacturers* or that these *manufacturers* were in any manner injured by it or complained to the Commission about it. Nor is there any proof in the case that they were or did. On the contrary the proof is that these manufacturers procured all the ties they required to bind all the bagging they manufactured and they obtained most of it from these respondents as agents of the Carnegie Company after their former principals had failed or refused to supply them.

There is no finding and no proof that in the methods of business of respondents there was any discrimination in price or terms compelled by the respondents in favor of the purchasers of American Bagging or that any place in the country received prices or terms different from any other section.

There is no finding or proof in the case that the respondents in their conduct were prompted by the desire to or that their conduct did tend to stifle competition or to create a monopoly.

There is so finding that the public or that any person was injured unlawfully by respondent's methods of business.

Assuming, therefore, the authority in a proper case of the Commission to make a restraining order it has not in the case at bar made any findings to warrant the issuance of the order entered.

POINT VI.

There is absolutely no evidence to support the following Findings of Fact.

1. That the respondents, Warren, Jones & Gratz, are the general selling and distributing agents of American Manufacturing Company for the sale and distribution throughout *the States commonly known as the Cotton States of jute bagging* (Paragraph One). All the evidence in the case being to the effect as is found in Paragraph Two of the Findings that they "were the sole selling and distributing agents in all the territory *west of the Mississippi River* where cotton is grown."

2. That the Carnegie Company manufactures about seventy-five (75%) per cent. of all the steel ties manufactured in the United States.

The only evidence in the case as to the number of *"new"* ties manufactured was that supplied by the Commission and consisted of the sworn testimony of the officers of the several manufacturer's corporations as shown by the books of their companies, as follows, in bundles:

	1915	1916	1917	
Carnegie	1,308,624—59%	991,556—59%	1,170,887—65%	fol. 574
Pittsburg	249,985	183,764	210,585	" 585
Atlantic	437,338	368,990	334,212	" 212
Conners, Weyman	203,920	115,165	72,608	" 461
	2,199,867	1,659,475	1,788,292	

There can be no difference of opinion as to these figures for they were furnished by the Commission and they are the only figures on the subject in the

case. Previous to 1915 the Sharon Steel Company manufactured about 400,000 bundles of ties annually (fols. 774, 775). Had they continued to manufacture the same number in each of the succeeding years the Carnegie output would have been but 43% of the total number of *"new"* ties manufactured. But in addition to these *"new"* ties there were manufactured many hundreds of thousands of *rebundled and pieced* ties used to cover the rewoven bagging. Mr. Claude Hutchinson, the largest manufacturer or rebundled and pieced ties estimated that there were 800,000 bundles of these second-hand ties manufactured and used to cover the cotton crop in each of the years 1916 and 1917. (fol. 745). Assuming his estimate to be correct, and *it is only evidence in the case as to the number so manufactured,* the Carnegie Company made no more than 40 3/10% of *"all the ties manufactured"* in 1916 and no more than 40 5/10% of *"all the ties manufactured"* in 1917. These figures and in this testimony were called to the attention of the learned Examiner who made that "finding of fact" which the Commission confirmed as well as to the Commission themselves, and we are constrained to believe therefrom that the Commission gave scant attention to the evidence in the case and to the respondents' brief when they adopted this Finding of the examiner that the Carnegie Company manufactured 75 % of *"all the ties manufactured in the United States."*

It was necessary, of course, that there should be some exaggerated finding of fact to support the conclusion the Commission deduces therefrom "that the respondents sold and distributed such a large proportion of the entire amount of the cotton ties manufactured and sold, that they had what

"amounted" to a monopoly of the cotton tie business of the country," which becomes mere rhetoric in view of the actual fact that they manufactured but 40 % as is shown by all the evidence in the case. But as the motives which actuated the Carnegie Company to make more ties when their competitors were decreasing their output was both lawful and praiseworthy, this finding is not harmful.

The learned counsel for the petitioners in a foot note on page 2 of his brief, states that:

> "By an inadvertent typographical error the findings as to the facts made by the commission stated the amount of steel ties manufactured by the Carnegie Co., to be 75% of all those used in the cotton balling business of in the United States."

He admits the error and now claims that the product of the Carnegie Co., amounted to 59% in 1916 and 65% in 1917. We first call attention to the fact that even now the full extent of the error is not admitted and corrected by the counsel for the petitioners. The Carnegie Co. only produced that percentage of the *new* ties used, and the undisputed evidence is that the Carnegie Co. produced but 40% of *all* the ties used. We further say that we would be much pleased to believe that so important a branch of the Federal administration as the Trade Commission was unwittingly lead into the statement of an erroneous fact in their solemn findings as to the facts but we are compelled by the force of uncontradictable facts to assert the contrary. On page 19, folio 36, in the proposed findings 4 of the examiner, submitted with the testimony to

the Trade Commission will be found the following: "and that the Carnegie Steel Company manufactures and sells annually *75% of all the steel ties made in the United States for the purpose of baling cotton.*" This error was not only called to the attention of the Trade Board on the argument of the case before that body but the same table of figures which is hereinbefore printed in this brief showing the output of the several steel companies was printed and may be found on page 2 of the brief submitted by the counsel for these respondents to the Federal Trade Board in the argument there. And if the findings of the Trade Board are subject to review and correction by their own counsel, may not this Court have the same privilege? We think that further comment on this subject is unnecessary.

3. That purchasers of ties "were oftentimes compelled to buy bagging manufactured by the American Manufacturing Company from the respondents in order to procure a sufficient supply of steel ties *used for the purpose aforesaid*" (Paragraph Four, Findings).

What the Commission understands by the phrase "used for the purpose aforesaid" is not clear as it is not disclosed by the context. But assuming that they mean that the respondents oftentimes compelled purchasers who only wanted to buy ties to buy American bagging as a condition of getting ties, and that *"oftentimes"* purchasers did so buy bagging and ties when they only wanted ties, then we say there is no evidence in the case to support this Finding. Either as agents of the Carnegie Company or as agents of American Manufacturing Company it was the lawful privilege of the respon-

dents to refuse to sell either ties or bagging except in proportionate quantities of both, *provided their conduct in that regard did not tend to create a monopoly or to stifle competition.* Nevertheless, without respect to their rights, they contend that *there is nowhere in this record any evidence that any person was compelled by these respondents at any time to purchase and did purchase American bagging as a condition for obtaining any quantity of ties.*

The only witness who comes anywhere near to giving such evidence is G. O. Korndorfer, the manager for Rumbel-Wenzel Company; but an examination of his whole story proves directly to the contrary and shows that the respondents, P. P. Williams & Company, were the only persons in the country from whom he could or did get ties in 1916. Rumble & Wenzel Company handle about 700,000 yards of bagging and 10,000 to 15,000 bundles of ties annually (page 101). In the course of his examination it developed that *he purchased all of these* 15,000 *bundles of ties from the respondents in* 1916; that in 1916 he handled 500,000 yards of bagging only 100,000 yards of which he bought from respondents; that he used to get ties bought the Pittsburgh Steel Company, but had been unable to get ties from them during the last several years (page 102); that one time he handled ties for the Atlantic Steel Company, but in recent years they refused to quote him; that Connors-Weyman Company also refused to quote prices on steel ties to Korndorffer or his principals for the last couple of years; that he and his principals have been unable to get quotations from any manufacturer of steel ties other than the respondents (fol. 119).

He is asked on his direct examination.

"Q. With whom did you negotiate in this effort to secure ties in the Fall of 1916?

"A. With pretty nearly—I should say, every ties concern in this country. It was utterly impossible. We could not get any ties in any manner, shape or form *without buying American bagging.*

"Q. Through whom did you finally buy these ties?

"A. From P. P. Williams & Company of Vicksburgh. The first order was for 5,000 bundles of ties, this to go with 100,000 yards of bagging (fol. 107).

"Q. At that time state whether you were already supplied with bagging?

"A. We were, with Ludlow bagging, manufactured in Boston, Mass. We had 300,000 yards of Ludlow bagging at that time. It was not all we needed for the season. We bought more afterwards. We carried over 50,000 yards of the American bagging that we bought from Williams" (page 54, fols. 108, 109).

This is the sole testimony in the case produced by the Commission to support the several allegations made by them, that anyone was forced by the respondents to buy bagging as a condition of getting ties. On the cross-examination of this witness, the following facts were brought out:

He had been a customer and a representative of the Ludlow Associates, manufacturers of cotton bagging, for many years, and never purchased his ties from the respondents before 1916. He had

been the local agent of the Pittsburgh Steel Company and the Atlantic Steel Company, both manufacturers of cotton ties, who had every previous year supplied him with ties. They refused to supply him with ties in 1916 (surely not because he would not buy American bagging), and in his extremity he came to Mr. Fitzhugh of the Williams Company, the agents of the American Manufacturing Company, who kindly helped him out by selling him 5,000 bundles of ties owned by the American Manufacturing Company.

In 1915, Korndorffer got his ties from the Ludlow Associates, who furnished him his bagging (fol. 123). In 1913, 1914, 1915 and 1917 Korndorffer had no trouble in getting his ties without buying American bagging (fol. 130). *The only time he claims that he was compelled to buy American bagging was in* 1916 (page 64, fol. 131). In 1915 and previous, Korndorffer got his ties as well as his bagging from the Ludlow Associates. When asked why he did not buy his ties, or try to buy his ties from the Ludlow people in 1916, whose bagging he was handling and had for a long time handled, he answered:

"Simply because they do not manufacture ties, *and do not handle ties.*"

This, after he had already testified that he got his ties from the Ludlow Associates in 1915.

> "Q. Did you make any effort to get ties from them?
>
> "A. Yes, sir—no, I did not make an effort to get ties from them, but I did make an awful effort—

"Q. To get them from Williams & Company?

"A. No, sir, from the Ludlow people, to try to straighten out the tie question to get some ties. We applied to them for help as we are getting desperate. It looked like we were not going to get any ties at all and *we were handling* 700,000 *yards of 'their' cloth and we thought that 'they' might have some influence with the tie people*, so we appealed to them" (fol. 132).

Korndorffer further testifies:

"I asked them to get us some ties. *They stated they were not in the tie business; that they happened to have a few bundles of ties for some Texas people*, and for us to be patient, they thought we would get some ties. We appealed to them to try to help us and *they gave us the name of the Connors-Wyman Company of Birmingham, and the Atlantic Steel Company, at Atlanta, and the Pittsburgh Steel Company of Pittsburgh. They all refused to quote us*" (page 65, fols. 134, 135).

It will be noted that the Ludlow Associates *did not refer him to Warren, Jones & Grats for ties* because they had already supplied the Ludlow Associates with the ties for Korndorffer's bagging.

After being refused ties by everyone with whom he had previously dealt, including the Ludlow Associates, from whom he had annually purchased 700,000 yards of bagging, who likewise deceived him if his statement above is true, Mr. Fitzhugh of the Williams Company sold him 5,000 bundles or 150,-

000 ti[illegible], and at the same time sold him 100,000 yards [illegible]bagging. These ties came out of the stock of the American Manufacturing Company's ties which was 50,000 ties more than the allotted number to go with 100,000 yards of bagging, "pattern" consisting of six yards and six ties. This occurred in the month of May before the market opened, when everybody else to whom he had applied refused him ties. And Fitzhugh later, on the 23rd of August, when the market had opened, sold and sent him 10,000 more bundles of ties, without any bagging, a total of 15,000 bundles in 1916 (page 66, fol. 137), *that being the greatest quantity of ties he had ever purchased in any year,* and this without selling or asking to sell him a single yard of bagging beyond the first mentioned 100,000 yards—50,000 yards of which he offered to take back. *So that this man obtained* 15,000 *bundles of ties,* 450,000 *ties in all, enough for* 450,000 *yards of bagging, and he bought only* 100,000 *yards.*

Yet, though Mr. Fitzhugh was the only one who did help him, with base ingratitude, he writes him in complaint. The following letter of Mr. Fitzhugh an answer to his letters of May 24th and 25th is self-explanatory:

> "We see nothing in the correspondence you enclose which could be considered as a hard-shop on you. Our principals were able to get only a limited number of cotton ties of the Carnegie Steel Company and they cannot possibly ship them all out in June and July. The mills are making the ties as fast as they can. You know what demands the Government is making on all of the tie manufacturers and you realize that the Government's orders must

be taken care of first. *You cannot possible need all of your ties in June and July and if they are shipped along to your customers as they need them during July, August and September, their requirements will be filled just as well as if they were shipped at once, earlier* in the season. *If you will consider the matter further you will agree with us that your position is not reasonable. We feel that every jobber in these times ought to realize the difficulties of the manufacturers and do all they can* to help them. *If you want* 3,000 *bundles of ties for shipment, say* 1,000 *each, in August, September and October from the mill, we will see if we cannot get them for you, but to expect all in June and July seems to us unreasonable,* and unless you will change your position that you do not want any August ties, we do not see how we can help you. We are taking our supplies from scattered shipments during July, August and September.

"Very truly yours,

"P. P. WILLIAMS & COMPANY."

(page 70).

This unreasonable man who obtained all the ties he required for his business, who got them in suitable time for his market, got them entirely out of the supply purchased and owned by the American Manufacturing Company, a competitor of the Ludlow Associates, whose agent he was, and got all he ordered, all he bargained for, at the very beginning of the season, and was unreasonable as to the time of the delivery of them, bases his charge that he

was "compelled" to buy 100,000 yards of American bagging on a conversation had with Mr. Fitzhugh, which he subsequently detailed as follows:

> *"I do not think there was anything said about bagging when we bought the ties, except Mr. Fitzhugh—I think he said, he did say, 'Can't you use some American bagging?' I said 'No,' and he said, 'Well, I am selling it alongside to anybody.' I said, 'Of course, in your territory you can handle American bagging where they require it, as in the case of Ludlow with us'"* (page 73, fol. 153).

It is needless to say that Mr. Fitzhugh, who is far more worthy of belief than Korndorffer, entirely denies Korndorffer's version of the sale of the American bagging. Mr. Fitzhugh says he called Korndorffer on the telephone to try to sell him some bagging, argued with him about it and finally at his request, sent him two rolls of bagging as samples—one was Calcutta bagging—the other Borneo Brand made by American Manufacturing Company. That Krondorffer afterwards called him up and ordered the American Borneo Brand—100,000 yards and at same time ordered 5,000 bundles of ties (page 276, fol. 646).

This is the only witness who testifies that he bought bagging under compulsion in order to obtain a supply of ties. WE CHALLENGE THE COUNSEL FOR THE COMMISSION TO POINT TO ANY OTHER TESTIMONY IN THE RECORD WHERE THIS MAN OR ANY OTHER PERSON MAKES A CLAIM TO THE CONTRARY. Here is a summary of the testimony of each witness.

S. H. Lowenberg, who made the complaint to the Commission, testified "Williams & Co., and Elmer were the only parties that we could get any quotations from at all."

"We tried Atlantic, Connors-Weyman and Pittsburg Co. They advised us they were all out of the tie business" (fol. 156, page 74).

Q. *You did not know any people at all from whom you were able to purchase ties except C. O. Elmer and P. P. Williams & Co.?*

A. *That is all* (fol. 156).

I have been able to get all the ties I wanted from P. P. Williams & Co. (fol. 158).

Q. *Were you required to buy bagging to get the ties?*

A. *No, sir* (fols. 159-166, 167).

The witness testified that he went out of business because he *"understood"* he was required to buy 100,000 yards of bagging with 3,000 bundles of ties (fols. 174-175). *"Korndorffer told him so"* (fol. 165).

Q. They never told you they required you to buy 3,000 bundles?

A. I have no record of it. I don't say they told me that.

Q. *That is the general impression you have and that is all you have to say about it?*

A. Yes, sir (page 82, fol. 175).

Lowenberg had formerly been the agent for the Pittsburg Steel Co.

Q. Why did you discontinue your agency for the Pittsburg Steel Co.?

A. They stopped manufacturing them so they claimed.

Q. Is it not a fact that the Pittsburgh Steel Co. have made ties this very year?

A. I could not say so.

Q. They told you they had discontinued your agency?

A. Possibly they did. *We certainly got the information from them that they had discontinued the manufacture of ties.*

Q. Will you say that they have not made ties every year since?

A. I would not say because I do not know (fol. 180).

Q. Your only and sole effort last year to get ties was from Elmer & Co. and P. P. Williams & Co. You got your ties and made no effort to get them elsewhere, but were still dissatisfied and wanted to *complain to the Federal Trade Commission on the supposition that possessed your mind that somebody controlled the situation.*

A. *That is about it* (page 85, fol. 181).

This is the character of the evidence and of the witnesses that Federal Trade Commission produces to support the allegations in the complaint charging responsible business men with the violation of the Federal statutes for which they might be indicted as criminals.

Not a single other witness, and the Commission examined in all sixteen witnesses, testified that he was compelled to buy American or any other kind of bagging in order to obtain ties. We quote in detail from the other fourteen witnesses: Charles Platter of Boren & Stewart testified that he had carried over 35,000 yards of bagging from 1915. He had purchased this with a proportionate amount of ties from Warren, Jones & Gartz. He sold his ties, 6,000 bundles, to M. M. Graves as a profit in December, 1915; in the spring of 1916 before

the market opened he came back for more ties to go with 35,000 yards of bagging carried over (page 98, fols. 212, 216) and desired to purchase 6,000 bundles of ties—just the number he had sold to Graves. He was told he could not have them then, but he did get a telegram from Warren, Jones & Gartz in September, 1916, offering him all the ties he wanted (page 100, fol. 217).

W. M. Foster of Early-Foster Co. bought all the ties he wanted from Williams & Co. in 1916 without bagging (page 129, fol. 289).

Mr. M. Graves, dealer in ties and bagging, sells American bagging and sugar cloth purchased from Young & Metzner. In May, 1917, Warren, Jones & Gratz did not have ties to spare. They did furnish him ties to go with the bagging he had purchased (page 137), and he got the ties for sugar cloth, 40,000 bundles from Warren, Jones & Gratz as agents for the Carnegie Co. through Young & Metzner, who sold him the cloth (page 137, fol. 309). Shortly thereafter on May 19th, Warren, Jones & Gratz by letter offered to sell him 25,000 bundles of ties without bagging (page 137, fol. 310).

Edward Brim, who was "kind of speculating" in ties (page 159, fol. 361) tried to buy from Warren, Jones & Gratz in February long before the market opened. He did not get his ties then but did get them in September and without bagging (pages 158, 159, fol. 359). Had sufficient to carry over a stock of ties each year.

J. C. Werner of Mente & Co., dealers in sugar cloth and American bagging, also manufacturers of pieced or remade ties:

He only had an impression (page 162 fols. 369-375).

"In 1915, bought 20,000 bundles of ties through Elmer; that is, we thought we bought them" (page 161, fol. 366). "Elmer told me he could not let him have the ties on account of not buying bagging. I do not know which Elmer it was. He was in the office. I do not know whether he was one of the firm or not" (page 162, fol. 367). "It was over the telephone" (page 164, fol. 372).

This is his sole evidence on this topic. He did get ties all he wanted without bagging in 1916, (fols. 373, 378, 377, 380) and also in 1917. Got all the ties he needed in his business in 1915, 1916 and 1917 (page 167, fol. 380).

Nowhere does the witness say that he was ever compelled to buy bagging in order to secure ties.

C. Lee McMillan, in bagging business at New Orleans.

He tried to buy bagging and ties from Warren, Jones & Gratz, through C. O. Elmer, during 1915, 1916, 1917.

"Elmer read to him a letter he wrote them offering to guarantee any transactions that McMillan might have with Warren, Jones & Gratz. They still declined to sell him" (page 171, fol. 391, page 173, fol. 395).

McMillan had defrauded Warren, Jones & Gratz, out of several thousand dollars, and they exercised their legal right to select their customers and they did not choose to deal with frauds. McMillan had dealings with Atlantic Company, resulting in a

law suit. They refused to deal with him (pages 182-183). Connors-Weyman and Pittsburg Steel Company, also refused to deal with him (pages 180, 181, fol. 415).

R. C. Wilkerson, a broker retired from business. The attorneys for the commission asked this witness a number of incompetent questions which, with his answers, have no relation to the matters under investigation (pages 88, 89).

W. F. Bridewell, an agent for the South Carolina Bagging Co., testified that on May 19th, 1917, before the market opened, Williams & Company wired him "will not sell ties without bagging" (page 108). Nothing more.

August Wisrod, in storage and warehouse business, got a telegram from one W. H. Wingle to inquire about ties. Called up one Adolph Risser of Galveston, on telephone who told him he could not sell ties wthiout bagging (pages 120, 121).

G. H. Fowler, Fordyce, Arkansas, with a grocery firm. Had a conversation with one Wilbur Orth of a brokerage firm at Pine Bluffs, Arkansas. Orth advised that he could not sell ties without bagging, page 114, fol. 253). Neither of these witnesses had any conversation with respondents.

Paul Kling, Secretary for H. & C. Newman, testified that:

> "Mr. Elmer reported that he could not fill an order for *I think* 5,000 bundles of ties which he had taken in the morning because Warren, Jones & Gratz declined to fill the order because we had not purchased any bagging."

Mr. Elmer it must be remembered was a broker in New Orleans, employed by American Mfg. Co.

to sell them bagging with a guaranty of so much a year (fol. 853, pages 362, 363; pages 187, 188, fol. 431). The American Co. was selling them ties with their bagging just as the Ludlow Co. was—Each company having purchased its supply of ties from Carnegie Co. But this witness admits that he did buy 3,500 bundles of ties from Warren, Jones & Gratz in 1916 and 5,000 bundles in 1917 without bagging and that he obtained all he wanted to buy and without bagging (fol. 436, pages 189, 190).

Benjamin Margolius, was the proprietor of two corporations, the Atlantic Jute Mills, and Southern Bagging Mills. He had defaulted on a previous contract with Warren, Jones & Gratz. They refused even to quote him (pages 238, 239). He testtified:

> "The Atlantic Jute Mills were in operation only a part of 1916. 'It is a new corporation. In 1917, our first full year we made every effort to obtain ties from the manufacturers *and did not succeed in* buying a single bundle' (*page* 238, *fol.* 551). *'I made every effort to buy them. I tried to buy from Atlantic Company, from Connors-Weyman; from Pittsburg Steel Company, Sharon Steel Company, or anybody I knew in the business or had ever been in it. They all declined to quote us'*" (page 243, fol. 564).

John S. Jenkins, the Dixie Manufacturing Company, manufacturer of rewoven bagging. He testified:

"We asked Warren, Jones & Gratz to sell us ties in 1916 and they said they had none to offer. They did sell us ties later (page 231, fol. 556), then we got all we wanted (page 233, fol. 541); we got them between June 30 and July 13" (page 234, fol. 543).

W. P. Gohlson, secretary South Carolina Bagging Co. and also of the India Bagging Co., Henderson, N. C.

Though not relevant to the inquiry he was asked and permitted to testify that his business suffered because he was unable to procure ties in 1916 (page 210, fol. 486). These two companies are practically the same (fol. 490). Exactly what each manufactures is not disclosed by the record for their Secretary and Treasurer, Gohlson, who was the only officer of the Company, testified two ways on every question asked him except his name (pages 212-213).

Gohlson testified that the Carolina Co. employed the witness, W. F. Bridewell, at Little Rock Arkansas, and Lyle and Lyle at Huntiville, Alabama, as their agents (page 208, fol. 482; page 212, fol. 490). While claiming that he could not get ties in 1916, he admits that though he never tried to purchase from Warren, Jones & Gratz their agents sold him all the ties he asked for. Claude Hutchinson testified that he sold him, and he admitted that he bought from Hutchinson 18,000 bundles of new Carnegie ties in 1916 (page 209, fol. 484; page 214, fol. 495). He admits he sold them by the pattern with his bagging (page 215, fol. 497) and will not deny that he sold a large part of them at a profit of $1.15 on each bundle (page 215; fols. 498, 499).

In November or December, 1916, Claude Hutchinson bought back from the Carolina Co. 15,000 bundles of these new ties, and Gohlson admits that in 1916 he also sold to Hutchinson 800,000 pounds of spliced ties (page 222, fol. 575); *that for three or four years he had been selling ties to Hutchinson.* In 1917, he testified, the Carnegie Co., through Warren, Jones & Gratz, sold him 25,000 bundles of new ties (page 217, fol. 502); through his brokers, Bridewell, and Lyle & Lyle, he purchased 35,000 bundles of new ties through I. W. Cooper, agent for Warren, Jones & Gratz, the Carolina Bagging Co., purchased 45,000 bundles new ties from 1914 to 1917, and Mr. Cooper testifies he sold them all they ever asked for (page 223, fol. 516; page 339, fol. 800).

A large part of these ties the Carolina Co. sold without bagging at a profit. Some they sold to W. M. Foster of Earley-Foster Co. at an advance of 25 cents a bundle (pages 129, fol. 290). And their agent, Bridewell, testified that he sold 25,000 bundles of these ties as they came in solid car load lots out of Pittsburg for account of Carolina Co. and at the prices they quoted (pages 111, 112; fols. 246, 247). Instead of being without ties the Carolina Co. was speculating in ties. His brokers, Bridewell & Lyle, were circularizing the cotton States all this time, stating that they were manufacturers of new ties, and urging all to buy before the market opened as ties were going to be scarce, and they *were advertising that they would not sell ties without bagging.* Gohlson finally admitted on cross-examination that he had no difficulty in procuring ties. He could get a better freight rate out of Pittsburgh for trans-Mississippi territory than

he could from Atlanta or Birmingham and that his trouble laid there (pages 224, 225; fols. 519 to 522). A number of letters were voluntarily produced by one of the respondents, Mr. W. H. Fitz Hugh of P. P. Williams Co. and counsel for petitioners copiously quotes them in his brief, but carefully abstains from giving the testimony explanatory of them. Mr. Fitz Hugh received instructions from respondents not to sell the American ties to those using sugar bags—the reason—Young & Metzer and Federal Sugar Co. had already been supplied with all ties required for their output—See letters in Appendix.

As to Gayer & Co., Vicksburgh. In 1915, Mr. Fitz Hugh had sold Gayer & Co. 33,000 bundles of ties at one time (fol. 612, page 262). And he did in 1916 sell him 11,000 bundles (fol. 614, page 263), although he bought Ludlow bagging (page 263). Boven & Stewart, as we have shown hereinbefore purchased ties without bagging—sold them to M. Graves at an advance and came back for more, which was refused until after others had been supplied.

The foregoing embraces the story of every witness and all the evidence produced by the Commission to support their finding that

> "purchasers of ties were '*oftentimes*' compelled to buy bagging manufactured by American Manufacturing Company from said respondents in order to procure a sufficient supply of steel ties,"

and we do not hesitate to say that there is not a scintilla of evidence in the record to support this finding, *and we challenge the attorneys for the Fed-*

eral Trade Commission to question the accuracy of the foregoing statements taken from the testimony in the record, and to refer to any testimony in the record in contradiction of that herein quoted by the respondents:

POINT VII.

Errors in the admission of evidence.

From the viewpoint of a lawyer this so-called investigation took no more the character of a legal proceeding than the meeting of a sewing circle.

There were legal errors committed in the examination of every witness as conducted by the attorneys for the Commission. Opinion and hearsay testimony was given by every witness for the Commission. No witness was confined to a statement of the facts.

Korndorffer, the only witness who gave any testimony approaching a confirmation of the charges against the defendants, was asked: "Whether or not you were unable at any time to secure bagging and ties as your requirements demanded?"

A. We have represented the Ludlow folks, I suppose—well, I should say, forty year— at any rate, the whole thirty years I have been connected with my firm in Natchez, and last season, 1916, *we had an awful time trying to get ties, and we could not get any ties from any so-called independents, or Warren, Jones & Gratz, or P. P. Williams, without buying American Bagging, as you will see by the bill here that we were forced to buy* 100,000 *yards of American Bagging to get ties.*

Q. Is that the bill?

A. Yes, sir.

Q. With whom did you negotiate in this effort to secure ties in the fall of 1916?

A. With pretty near I should say every ties concern in the country. It was *utterly impossible. We could not get ties in any manner, shape or form without buying the American Bagging*" (page 53, fols. 106-107).

The "bill" referred to by this witness is found at page 16 of the testimony, is only the ordinary invoice for 100,000 yards of bagging in two separate bills, and a letter from Mr. Fitzhugh of Williams & Co. informing Korndorffer that he was diverting to him two car loads of ties that should have gone to other people, and ends with this expression: "We are glad to be able to help you in the matter" (pages 56, 57; fols. 113, 114).

This testimony is purely opinion evidence without a solitary fact on which to base it other than that Williams & Co. gave him ties when no one else would, and gave him ties by depriving some one else of them. He was not asked to state the facts. He just gave forth pure "loose talk," as did every other witness examined by the attorneys for the Commission. This testimony is clearly incompetent *and this is the only evidence in the whole record to support the finding that "'oftentimes' dealers and jobbers were compelled to buy American Bagging in order to obtain ties."* On cross examination it developed that even this opinion of the witness was unwarranted.

William & Co. sold him 10,000 bundles of ties in August, 1916, without bagging (fol. 137), making 15,000 bundes in all, in 1916, enough to go with

450,000 yards of bagging. And in 1917 he got all the ties he wanted from P. P. Williams & Co. without buying any bagging (fol. 144). There were four other manufacturers of new ties and numbers of makers of second-hand ties, and he is asked and makes this sweeping declaration of inability to procure ties without giving any of the facts showing that any of the other manufacturers had refused him, or the reason why if they did.

S. H. Lowenberg, the witness who made the complaint, never tried to buy ties from Warren, Jones & Gratz in 1914, 1915 or 1916 (page 73, fol. 163). Did not try to buy from P. P. Williams & Co. in 1916 (page 164). He had defrauded Warren, Jones & Gratz in a previous year (page 80, fol. 169; page 86). He was allowed to testify as follows:

Q. Who told you you had to buy 100,000 yards of bagging and 3,000 bundles of ties?

A. I consulted a good deal with Mr. Korndorffer. A few years ago we used to buy a good deal of it together.

Q. Korndorffer told you?

A. Korndorffer told me the facts of it. Showed me a letter or telegram (page 78, fol. 165).

This is the character of evidence the Commission have based their findings on. Lowenberg further is allowed to say: "I think that was done. * * * *I have not the evidence to* produce in writing but *I think* it was the *general price made* through Warren, Jones and Gratz, who were practically the controllers of the situation (pages 74, 75, fol. 157).

> "We understood that Warren, Jones & Gratz *handled absolutely* the general tie situation in this country" (page 84, fol. 179).

And he is asked:

Q. Was it not the fact that C. Lee McMillian & Co. have been unable to get any ties lately? (page 75, fol. 158).

It may not be out of place here to refer to the facts that there is proof in the record that these two witnesses, Lowenberg and McMillian had both defrauded Warren, Jones & Gratz in former years.

R. C. Wilkerson a broker formerly representing a manufacturer who went out of business, is asked such questions as these:

Q. Do you know of any one else who |manufactures ties except the Carnegie Steel Co.?

Q. Can any one else get ties from Warren, Jones & Gratz except Williams & Co.?

Q. Why is it you could not buy ties from the mills at Birmingham and Atlanta in order to compete with P. P. Williams & Co. if you wanted to stay in the business?

Q. You had to discontinue business because P. P. Williams & Co., could sell them lower than you could possibly afford to do it. Was not that the reason?

A. No, sir. I had to discontinue business because I did not have any connection that would give me the prices.

Q. That is just another way of stating the same thing. You could not sell the goods at a price where you could compete with P. P. Williams & Co.—*is not that so?* (pages 89 and 90). This witness knew absolutely nothing that was relevant to the charges against the defendants set forth in the complaint, yet the attorney for the Commission tried to make him express opinions that would create an atmosphere of prejudice against the defendants, Warren, Jones and Gratz.

G. H. Towler had a conversation over the telephone with one Wilbur Orth, of Pine Bluffs, Ark., whom he said "had the account" of Warren, Jones & Gratz. He detailed this conversation to hold the defendants responsible (page 114, fol. 251).

August Wisrodt of Galveston, in the storage business was asked by a Mr. Wingle of Mills Point to get him some ties. He telephoned one Adolph Risser in Galveston (pages 119, 120, fols. 265, 267), who "used to be with Mr. Price. When Mr. Price was alive he was Mr. Price's chief clerk, *so I presume* he was Chief Clerk in the office of Warren, Jones & Gratz (page 121, fol. 269).

W. M. FOSTER:

Q. To whom did you give the order?

A. I did not buy from Warren, Jones & Gratz. I gave it to the Sheer Co. (page 123, fol. 275).

Q. The Sheer Co. are wholesale jobbers at Waco, who buy, sell and trade in ties?

A. Yes, sir.

Q. Do you want the Commission to understand that the Sheer Co. are agents of any kind for Warren, Jones & Gratz, or simply handle their goods?

A. They simply handle their lines of bagging and ties as far as I know (page 126, fol. 281). I made a contract direct with Warren, Jones & Gratz while Sheer Co. sold their goods (page 128, fol. 286).

J. C. WERNER of Mente & Co., New Orleans.

This witness admitted on cross examination that he got all the ties he desired, in 1916, 1917. He was asked on the direct about an incident that occurred early *in* 1915. His examination took place *Octo-*

ber 22, 1917. He was permitted to testify: "We have not been able to buy ties from Warren, Jones & Gratz since 1915, they insisted on our buying bagging with ties" (page 161, fol. 365). "They (Elmer & Co.) got us ties and we bought 25,000 bundles. They (Elmer & Co.) quoted us and we accepted, but the same day "*they*" *must have received a wire from St. Louis* and said they could not sell us ties without a corresponding amount of bagging" (page 164, fol. 372).

Q. Do you know which Elmer it was?

A. *No, sir. It was over the 'phone I do not know which it was* (page 164). It developed that his whole story was founded on an impression he received from something that occurred in 1915 (page 165, fol. 375). This is the sole testimony he gave that had any relevancy to the matters under investigation.

W. P. Gohlson, secretary, Carolina Bagging Company who manufactures both ties and bagging is asked:

Q. Testimony has been introduced to the effect that Warren, Jones & Gratz, have adopted a policy of selling ties only with an equivalent amount of cotton bagging. Will you please state what a continuance of that policy will mean to your business if you were unable to get cotton ties from Warren, Jones & Gratz without cotton bagging? (page 210).

He also testified that his brokers tried to buy ties, from Warren, Jones & Gratz, that they could not, that they wired him to that effect and did not even produce the telegram (page 209, fol. 483).

L. W. McMillan, like the witness Werner, testified to his *impressions* and was also permitted to testify from his *imagination* as to matters susceptible of exact proof, such as the number of ties made by the several manufacturers.

Every single witness was asked incompetent questions and allowed to tell "what you think," to give hearsay and opinion evidence. To recite them all would fill a book almost as large as the transcript of the record herein.

POINT VIII.

The conduct of the Federal Trade Commission in this case discloses either personal prejudice against the respondents or political propaganda.

The conduct of respondents condemned by the Trade Commission was in truth most praiseworthy and deserves the highest commendation. From motives of patriotism they sacrificed an opportunity of making a huge fortune through the necessities and at the expense of their fellow citizens. When the great war was at its peak and the world was demanding cotton and steel for ammunition and covering, when labor unions were threatening to tie up the transportation system of the Country and speculators were seeking to corner the market in ties, Mr. Anderson Gratz recognizing the necessity for gathering the cotton crop and the need of steel ties to bind the bales, told the president of the Carnegie Co. that "They had better make all "the ties they could and throw those not needed "into the ocean rather than run short. That the "prosperity of the United States depended on the "movement of the cotton crop which could not be "moved unless they made the ties necessary to "cover the crop." He urged the competing manufacturers—Atlantic Steel Co. and the Connors-

Wyman Co. to do the same. He made a price for the ties which was less than the selling price of the hoops from which they were fabricated, though the fabrication put upon them an additional cost of $2.00 for the ton. He requested his competitors to furnish ties to his own customers and reliquished to them the profits from these sales; and for the years 1915, 1916 and 1917 steel ties were the only commodity on the market for which the opening price each year was less than the closing price of the year before. To steady the market and allay the panic demand for ties he sold up to July 31, 1916,—1,363,478 bundles of ties or 371,912 bundles more than the total output of the Carnegie Co. for the whole year and faced financial ruin if the purchasers had insisted on the performance of their contracts.

And all of these facts were known to the Trade Commission before they started their investigation, for they were informed of them both by Mr. Gratz and by the trade throughout the country, which they had completely circularized. Yet what did they do? They framed a complaint which in the 2nd count charges the respondents with acts for which they might be indicted and imprisoned, if guilty, yet they do not offer a single witness or a scintilla of evidence to substantiate the charge. They make no finding of fact as to the truth or falsity of the charge and tucked away in the tail end of their conclusions of law they make the lame and impotent statement "that there is *not sufficient proof* submitted in the hearing to *sustain* the paragraph in the complaint charging a violation of Section 3 of the Act of Congress known as the Clayton Act," *well knowing that there was no proof whatever submitted, and that they never had any*

proof to submit. But this is not all. They select as the complainant a man, S. H. Lowenberg who "got out of the business because of the difficulties of it" (page 78, fol. 165), *his principal difficulty being a fraudulent failure in which he defrauded the respondents out of several thousand dollars.* And who were the witnesses? Listen! Lee McMillan, one of the chief witnesses had also cheated respondents out of some thousands of dollars; Benjamin Margolius had defaulted on his contracts. M. M. Graves, W. P. Gohlson and his agent, W. F. Bridwell, Charles Platter and Edward Brinn, who were speculating in ties and naturally had no friendly feeling for the respondents who spoiled their winnings. G. H. Fowler, August Wisrod and J .C. Werner detailed conversations over the telephone, and W. W. Foster detailed personal conversations with persons who had no relations with the respondents whatsoever. R. C. Wilkerson knew nothing on the subject. Paul Kling and John S. Jenkins testified that they obtained all the ties they desired from respondents and without bagging. This embraces the entire list, their character and the character of their testimony.

And what does the Commission find? Merely that as the result of these extraordinary and patriotic efforts by the respondents they induced the Carnegie Steel Co. to make so many more ties than they otherwise would have made had they occupied a controlling position in the trade? This is the extent of their offending as found. Nothing more!

We hold that it is impossible to conceive of a disinterested public commission instituting this in-

vestigation and making the order made in this case wthout some ulterior motive of personal prejudice or political propaganda; that constitutional government was instituted among men to prevent just this kind of abuse, and the duty under our Constitution devolves upon our courts to suppress it.

Respectfully submitted,

THOMAS F. MAGNER,
Counsel for Respondents.

APPENDIX.

LETTERS IN EVIDENCE CONTAINED IN TRANSCRIPT.

July 7, 1916.

Mr. W. G. Clyde,
Carnegie Steel Company,
Pittsburg, Penna.

Dear Mr. Clyde:—

Enclosed find letter received today from the Ludlow Manufacturing Associates, and copy of my reply.

Apart from a few unpleasant words used by Mr. Wallace, he is doubtless justified in the way he looks at things.

In order to make Ties go around as far as possible, it is absolutely necessary to keep them out of the hands of speculators. *A good many people have wanted to buy Ties for the purpose of holding them for higher prices. These people we have declined to sell and have tried to limit our sales to merchants having a stock of Bagging of the American Mfg. Co., Ludlow Company or somebody else's; the idea being that the people with Bagging would be more apt to desire the Ties to sell promptly.*

So far we believe that we have done pretty well, and except for a lot of growling do not seem to have made any trouble.

Of the Ties bought by the American Mfg. Co., 120,000 bundles have been actually sold in the Southeast, 130,000 bundles are held to cover cur-

rent order from Mr. Priddy (N. B. Co.), Mr. Sparks and Chleston. 60,000 are for sole by P. P. Williams & Co. This office is making some sales right along. The rest of the 500,000 Ties will be sold as fast as Warren, Jones & Gratz find trade amongst people whom we think will promptly re-sell.

A good many Ties are now being sold by Atlanta and Conners. Second-hand Ties are being distributed in the Southeast.

I will be very much pleased to have you write me to St. Louis, Mo., Saturday making any suggestions that you may care to make as to a better method of handling this business.

Please send the correspondence from Mr. Wallace along with your letter.

Yours truly,

AG:W (Signed) ANDERSON GRATZ.

January 11th, 1916.

Mr. C. N. WALLACE,
Pres., Ludlow Manufacturing Associates,
Boston, Mass.

DEAR MR. WALLACE:

Referring to your letter of December 31st:

Yesterday I was in Pittsburg and had a conference with the officials of the Carnegie Steel Co.

Their net stock of Ties on hand at present is about 330,000 bundles. They think they can make 500,000 bundles more by July 1st, they will try

to add something to that. After the first of July their manufacture cannot exceed 125,000 bundles per month, if even it is possible to make that number.

I understand that you have quite a lot of Ties carried over, which should help you to begin the season. Under the circumstances, I think we are justified in asking you to moderate your demand for 150,000 bundles a little.

You can take this letter as giving you an option at our lowest opening price on 120,000 bundles of Ties, open to you for one week after we make the price, whether that be in April or July.

It is not possible for the price to be low. *To induce other manufacturers to make any Ties so that the crop may be covered, it may be necessary to have quite a high price, but all that will have to be decided in the future.*

The thing is that giving you this kind of an option on 120,000 bundles is giving you a larger offer on our prospective supply than has heretofore been the case.

If I am correct in thinking that you have between 50,000 and 75,000 bundles already on hand, *you have an ample supply until October, before which time we certainly hope that we will be able to care for any additional quantity that you may require.*

Yours truly,

(Signed) ANDERSON GRATZ.

January 19, 1916.

MR. C. N. WALLACE,
Ludlow Manufacturing Associates,
111 Devonshire Street,
Boston, Mass.

DEAR SIR:—

Your favor of January 18th received.

The trouble in the Steel business is to get raw Steel—however, we are going to have some Ties.

You may consider this letter an option on 150,000 bundles, open to you for one week after we name a price. Ties to be ready for immediate shipment at that time.

If, in the meantime, you can arrange storage for these Ties at Galveston, so much the better.

I suggest that it is quite probable that there may be trouble getting shipments from Pittsburg through, and it will be well if you can ask the railroad company at Galveston to take care of the Ties at the earliest possible date.

Allow me to say that if it had not been for your consistent preference given to us in this business, we most certainly could never have arranged with the Carnegie Steel Co. to give you this option.

Yours truly,

(Signed) ANDERSON GRATZ.

July 7, 1916.

MR. C. N. WALLACE,
Ludlow Manufacturing Associates,
111 Devonshire Street,
Boston, Mass.

Dear Sir:

Your letter of July 6th received.

You are under some misapprehension. I have never controlled the number of Ties to be made nor the price. My advice has usually been taken as to the number of Ties manufactured, and has sometimes been taken as to the price—not always.

This year I told the Carnegie Steel Co. that it was necessary to have 1,000,000 *bundles of Ties by the first of July, based on their competitors making about so many. Now, either the competitors have not made that many, or they are not willing to sell them freely, and the demand thrown on us has been more than we can supply.*

Amongst the earliest sales made by the Carnegie Steel Co., were 200,000 bundles to the Ludlow Mfg. Co. and 500,000 bundles to the American Manufacturing Co.—total 700,000 bundles, deliveries scattered over until November. Beginning July 1st with 1,000,000 bundles, we have counted on the Carnegie Co. supplying us a total of 1,400,000 bundles. Including the 700,000 bundles mentioned above, Warren, Jones & Gratz has sold 1,330,000 bundles—*just how it would be possible for them to continue selling to anybody I do not know.*

The American Manufacturing Co. is continuing to supply Ties out of the 500,000 *bundles they have bought, and have so far obligated about* 350,000 *bundles.* That leaves 150,000 bundles to bring Bagging business.

Messrs. Warren, Jones & Gratz as the selling agents for the American Manufacturing Co. cannot be allowed to sell those Ties except along with their Bagging. If we can get any more from the Carnegie people, they will be for sale first to the people who have bought the other 1,300,000 bundles, and then to the trade in general.

The Ludlow Company have been much better protected in this matter than the American Manufacturing Co. You have a provision of 335,000 bundles, while the total Ties on which the American Company had any claim were 330,000 bundles. *If anybody suffers in the whole operation, it will be the American Company.*

To *gain an advantage on our competitors and guard ourselves from disaster, we should have taken the Carnegie Co.'s whole* 1,400,000 *bundles, and would have been glad to do so except for the broader policy protecting the Carnegie Co.'s trade by giving Ties to every one who had been their customers in years past.*

I am expecting to hear to-day as to additional supplies of Ties, but fear that there will be very few possible for us to get.

This is one year when the Carnegie Steel Co. can well afford investigation. They have sacrificed their other business and large profits to make their usual quantity of Ties—have sold those Ties to their usual customers at a moderate price, even while others were getting from 10c. to 25c. per bundle more, *and now even you are disposed to criticize them because they have not made 50 per cent more ties they have usually made, and sold them to people who have not usually been their customers.*

Yours truly,

AG:W (Signed) ANDERSON GRATZ,

August 1, 1916.

MR. WM. G. CLYDE,
Ass't. Gen. Mgr. of Sales,
Carnegie Steel Co.,
Pittsburgh, Penna.

Dear Sir:

The prospects of the Cotton Crop are not so good, and whether the Crop is to be large or small, it certainly is late.

Everybody seems to have some Ties, and we no longer hear complaints from any source.

It now seems safe to do what we would have liked to have done before, and that is to offer Spot Ties broadcast throughout the Cotton Belt. I have, therefore, telephoned Warren Jones & Gratz to quote Ties to everybody from Norfolk west August-September shipment. There will be some sale no doubt, but I do not believe total purchases will amount to 25,000 bundles, which we will furnish from the American Manufacturing Company's Spot Stock.

Offering Ties in this way we will remove the last vestige of complaint, and will also encourage other holders of Ties to sell.

We have sold a good many Ties at $1.35 less 4 to the trade—some few at $1.35 flat. *Where your Ties have been billed to the American Manufacturing Company and then resold by the American Company without Bagging at a profit, account will be made to Carnegie for that profit, as you will remember that I told you the American Manufacturing Company's Ties were being bought only for sale with Bagging and would not be held for any profit where sold without Bagging.*

If the cotton crop really is short, it is quite possible that it may not be necessary to increase your manufacture in October beyond 100,000 bundles as first contemplated.

Yours truly,

AG:W (Signed) ANDERSON GRATZ.

August 3, 1916.

MESSRS. YOUNG & METZNER,
355 Vernon Ave.,
Long Island City.

Gentlemen:

Herewith find some Carnegie Freight Lists.

I quote you for account of Warren, Jones & Gratz of St. Louis, Mo., any part of 10,000 bundles Standard Arrow Cotton Ties for August shipment at $1.31¾ Pittsburg basis plus these freights. The Ties may be shipped from Youngstown or somewhere else.

Price is arrived at on the base of $1.35 less 4c. per bundle to large dealers plus ¾ of 1c. per bundle for August shipment. If you want these Ties for September, price will be another ¾c. per bundle higher, and so again for October.

This price good to you until Noon August 4th.

Yours truly,

AG:W (Signed) ANDERSON GRATZ.

August 3, 1916.

MR. WM. G. CLYDE,
Ass't. Gen. Mgr. of Sales,
Carnegie Steel Company,
Pittsburg, Pa.

Dear Sir:

Referring to your letter of August 2nd to Messrs. Warren, Jones & Gratz:

I have called up Mr. P. L. Wooster, P. A. of the Federal Sugar Refining Co., and offered them 3,000 bundles of Ties, which is all they talk about wanting.

I have also called up Messrs. Young and Metzner from whom you recently had a letter, and offered them 10,000 bundles.

Enclosed find copies of letters written in confirmation to each of these concerns.

I doubt if either will buy any Ties, but we are putting ourselves on record as offering them all they talk about wanting.

Yours truly,

AG:W
Enc.

(Signed) ANDERSON GRATZ.

30367